

IN THE SUPREME COURT OF MISSOURI

TIFFANY FRANCIS, et al.,)	
)	
Respondents/Cross-Appellants,)	
)	
vs.)	Case No. SC92571
)	
ROBIN CARNAHAN, et al.,)	Cole County Circuit Court
)	Case No. 11AC-CC00546
Appellants/Cross-Respondents.)	

**Appeal from the Circuit Court of Cole County, Missouri
Nineteenth Judicial Circuit
The Honorable Daniel R. Green, Judge**

BRIEF OF RESPONDENTS/CROSS-APPELLANTS FRANCIS AND HOOVER

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JURISDICTIONAL STATEMENT

In this case, Cross-Appellants Francis and Hoover challenge the official ballot title for an initiative petition, and assert that the initiative petition is unconstitutional. Francis and Hoover appeal from an April 17, 2012 (Second Amended) Final Judgment of the Circuit Court of Cole County dismissing Counts IV and V of their Petition as “not ripe.” The circuit court certified its judgment as final pursuant to Rule 74.01(b) of the Missouri Rules of Civil Procedure. Cross-Appellants filed their notice of appeal with the Western District Court of Appeals on April 23, 2012.

On May 29, 2012, the Supreme Court transferred the case.

STATEMENT OF FACTS

A. Initiative Petition 2012-066

James Bryan submitted a sample sheet for an initiative petition proposing Anti-Payday Lender amendments to Chapters 367 and 408, RSMo,¹ on July 7, 2011. LF25-29. MRL claims the purpose is stated therein:

[T]o prevent lenders, such as those who make what are commonly known as payday loans, car title loans, and installment loans, which have typically carried triple digit interest rates as high as three hundred percent annual or higher, from charging excessive fees and interest rates...

LF26.

B. The Secretary of State's Summary Statement

The Secretary of State prepared a summary statement to be included in the official ballot title. The Secretary's original summary statement reads:

Shall Missouri law be amended to limit the annual rate of interest, fees, and finance charges for payday, title, installment, and consumer credit loans and prohibit such lenders from using other transactions to avoid the rate limit?

LF50. The proposed summary statement was submitted to and approved by the Attorney

¹ All statutory cites are to RSMo unless otherwise noted.

General. LF49.

C. The Auditor's Fiscal Note and Fiscal Note Summary

1. The Auditor's "normal" procedures

The Auditor's normal policy in preparing a fiscal note is to send copies of the proposed measure to state and local governmental entities requesting information regarding the entities' estimated costs or savings for the proposed measure. 116.175 states that proponents or opponents *may* submit a proposed statement of fiscal impact to the Auditor within ten days of the Auditor's receipt of the proposed measure from the Secretary. The Auditor never posts fiscal note requests or the deadline for submission and neither "solicits" nor "takes" "public comments" on proposed fiscal notes. (TR17:1-10).

Despite the Auditor's enforcement of the requirement in §116.175, that only an avowed "proponent" or "opponent" may submit statements of proposed fiscal impact to him, the Auditor's corporate representative, Jon Halwes, admitted that he ignores the ten-day deadline found in the same statute. (Pl. Ex. 9, p. 15). He does not review the submission of proponents or opponents to ensure they comply with GASB standards as required by §116.175. (Pl. Ex. 9, p. 15). In addition, he admitted he does not follow 15 CSR 50-5.010, the regulation that purportedly governs the submission of proposed statements of fiscal impact. (Pl. Ex. 9, p. 15).

The Auditor's normal policy is to review the submissions of state and local governmental entities, and proponents and opponents, for completeness and

reasonableness. (Joint Stipulation “JS” 6). The Auditor's review for completeness consists of making sure that the entity's response conveys a complete representation of what the entity intended to send and is reasonably related to the proposed measure and to the suggested fiscal impact. (JS 6). If the Auditor has any questions regarding the submissions, the Auditor may follow up with that entity. (JS 6). If the Auditor finds a response to be unreasonable, that affects the weight given to that response in preparing the fiscal note summary. (JS 6). In creating fiscal notes, the Auditor includes the submissions verbatim, if possible, and makes as few changes thereto as is practical. (JS 6). The Auditor's normal policy is to take into account all submissions and draft the fiscal note summary based upon the fiscal note. (JS 6).

The fiscal note and fiscal note summary are prepared by a single individual in the Auditor's office, Mr. Jon Halwes, and is not substantively reviewed by any other individual. (TR15).² No matter what the response of state and local government entities and proponents or opponents, the Auditor includes it in the fiscal note, even if the responses are contradictory, irrelevant or nonsensical. (TR21-22).

2. Preparation of the Fiscal Note and Fiscal Note Summary for the Anti-Payday

Lender Initiative Petition

The proposed measure was sent to all state governmental entities the Auditor has

² All citations to “Tr.” Refer to the March 27, 2012 transcript. Citations to any other transcript shall be expressly noted in the citation.

on file. LF30-47; Ex.10. The proposed measure was not sent to all local governmental entities. LF30-47; Ex.10. The proposed measure was only sent to certain local governmental entities, at the discretion of the Auditor. TR18. Only six of the sixteen local governmental entities responded to the Auditor. TR166.

Dr. Joseph Haslag submitted a proposed statement of fiscal impact to the Auditor as an opponent of the proposed measure. LF32; Ex.7. No statement of proposed fiscal impact was submitted by James Bryan, or any other proponent of the proposed measure. LF32; Ex.3.

3. Dr. Haslag's submission to the Auditor and the Division of Finance Analysis

Dr. Joseph Haslag submitted a proposed statement of fiscal impact to the Auditor as an opponent under §116.175. LF35-44. Dr. Haslag's submission suggested that as a result of the proposed measure, payday (and title) loan businesses would close and there would be substantial costs to both state and local government entities. LF35-44. Dr. Haslag opined that there would be decreases in Missouri gross domestic product, Missouri general revenues, and both state and local licensing fees collected. LF35. Dr. Haslag also indicated there would be costs to the state as a result of increased unemployment insurance benefits. LF35. Dr. Haslag estimated total costs (based on closure of payday and title lending stores) would be \$13.65 million in Year 1 and \$3.6 million in Year 2. Attached to Dr. Haslag's report was also an analysis from the Division of Finance. LF44.

The Division of Finance indicated the proposed measure would put payday and title lenders out of business, and would put half of the “510 lenders” out of business, estimating the loss in revenue for all three groups at \$675,000. (*Id.*). The response also indicated the Division would need to “decrease...consumer credit examination staff by 4 of 5 examiners.” (*Id.*).

Halwes, the preparer of the Fiscal Note and Fiscal Note Summary, found Dr. Haslag’s analysis to be reasonably complete and accurate. (TR24-25). Dr. Haslag’s submission was included in the fiscal note essentially verbatim. (TR24). Halwes recognized that there were internal conflicts in the fiscal note, largely due to differences in assumptions made by the submitters. (TR30-31). Halwes stated he believed that Mr. Haslag’s assumptions, specifically that the proposed measure would cause businesses to close, was the correct assumption. (TR29-31). Halwes relied heavily on Dr. Haslag’s analysis in preparing the Fiscal Note Summary. (TR32-33). Halwes agreed that Dr. Haslag’s analysis did not address any of the fiscal impact on “510 lenders,” and conceded that he did not do any independent analysis to determine such impact. (TR36).

4. DIFP Response

Despite the Division of Finance’s analysis regarding the significant costs of the proposed measure, the Department of Insurance Financial Institutions and Professional Registration (DIFP) submitted the following response to the Auditor:

[The proposed measure] will have no cost or savings to the

department. If the adoption of the measure results in a reduction of fee revenue from consumer credit entities, the department anticipates it would expend a correspondingly smaller amount to regulate these entities.

LF33.

Despite its apparent conflict with the response from the Division of Finance attached to Dr. Haslag's submission, Halwes made no effort to clarify the issue. TR62.

5. The Secretary of State's Response

The Secretary of State indicated the cost of a statewide election on initiative petitions is over \$1.02 million dollars, approximately \$170,000 per issue. LF34. The cost of such election is paid by an appropriation by the General Assembly out of the general revenues of this state. *Id.*

6. The Auditor's Fiscal Note Summary

The Auditor's fiscal note summary for the proposed measure states:

State governmental entities could have annual lost revenue estimated at \$2.5 to \$3.5 million that could be partially offset by expenditure reductions for monitoring industry compliance. Local governmental entities could have unknown total lost revenue related to business license or other business operating fees if the proposal results in business closures.

LF50; Ex.3.

Halwes testified that in the course of preparing the fiscal note summary, he summarizes the points that he believes are important for the public. (TR84). The estimated range of annual lost revenue in the first sentence was taken by Halwes from Dr. Haslag's numbers. (TR38). No local government entities indicated the fiscal impact would be "unknown." (TR52). Dr. Haslag's submission included losses to certain local government entities. (TR52).

D. Shull and Stockman's³ pre-trial intervention failure

On November 28, 2011, Appellants filed a Motion to Intervene in *Francis v. Carnahan*. LF3. Their motion came more than three months after Francis and Hoover filed their lawsuit challenging the ballot title of the Anti-Payday Lenders Initiative. LF3.

Francis'⁴ lawsuit was filed on August 19, 2011, pursuant to §116.190. LF5-44. On September 22, 2011, both State parties filed Answers. LF51-70. Francis served discovery on the State parties on October 24 and 25, 2011. LF2. The State parties responded to such discovery on November 21, 2011. LF2. On November 23, 2011, Francis filed a Notice of Hearing, calling up the matter for a trial setting on November 28, 2011. LF2.

On November 28, 2011, at Francis' request, the Trial Court set trial for February 28, 2011. LF3. Shull's counsel appeared with their Motion to Intervene in hand. LF3.

³ "Shull," hereafter.

⁴"Francis" refers to both Francis and Hoover.

The trial court took the Motion under advisement, allowing Shull *additional* time to make his case. LF3. On December 13, 2011, Shull filed the first Supplement to Motion to Intervene. LF3.

Additional arguments on Shull's Motion to Intervene were held on December 28, 2011. (12/28/11 TR). Shull was again allowed *additional* time to make his case for intervention. (12/28/11 TR26.). On January 3, 2012, Shull filed *additional* pleadings related to his Suggestions in Support of Motion to Intervene. LF3.

1. The December 28, 2012 intervention hearing

Shull's counsel, Mrs. Vollet,⁵ presented arguments on Shull's Motion to Intervene at the December 28, 2012 hearing. Shull's counsel suggested that because Shull signed the Initiative Petition, he had an "interest" relating to the action. (12/28/11 TR6:7-11).

Shull's counsel attempted to introduce four separate exhibits (two signed petitions and circulators' affidavits and two verified interrogatory responses) into evidence. (12/28/11 TR11:2-8). Francis' counsel objected to all four exhibits. (12/28/11 TR11:10-11). The Court granted Shull additional time to respond to the evidentiary objections of Francis' counsel and Suggestions in Opposition to Appellants' Motion to Intervene. (Northcott/Francis 12/28/11 TR15:3-6)

Nevertheless, the trial court allowed the parties to make arguments on the Motion,

⁵Shull has since changed counsel. Mrs. Vollet represents Bryan and MRL before this Court.

“assuming that the documents were to come into evidence.” (12/28/11 TR15:7-10). Northcott’s counsel argued that Shull did not have an interest in the action because Shull’s counsel argued their interest was in the validity of the signatures and the claims before the court were not challenges to the validity of any signatures. (12/28/11 TR18:15-23).

Francis’ counsel also argued that Appellants lacked a sufficient interest to intervene as a matter of right. Francis’ counsel explained to the court: “[Y]ou have to show that you have an individually identifiable interest. It has to be more than a pure curiosity in the matter or a lesser interest in the outcome that doesn’t directly affect you.” (12/28/11 TR22:21-25). Francis’ counsel explained that Shull and Stockman were just two of at least 95,000 persons who would need to sign the Initiative Petition in order for it to get to voters. (12/28/11 TR23:4-10). Francis’ counsel explained that Shull was free to withdraw his signature at any time. (12/28/11 TR23:11-13). Proponents could choose not to file the Shull’s signature with the Secretary, and he would have no recourse. (12/28/11 TR23:13-17). Francis’ counsel also distinguished between Shull (as a signor) and proponents, explaining to the court that in other cases (cited by Shull) it is the actual proponents of the initiative that have been allowed to intervene, not just signors. (12/28/11 TR23:19-25, 24:1-3). Following the argument, Francis’ counsel asked that the evidence in the matter be closed. (12/28/11 TR26:7-8). The court suggested that counsel

for Shull would be given *additional time* to “figure out which way she wants to go.” *Id.*⁶

2. Post-Hearing Intervention related procedure

Shull’s Motion to Intervene was denied. LF3. The trial court did indicate it would allow Shull to participate as *amicus curiae*. LF124. Shull never moved for leave to amend his Answer to plead additional claims, defenses, or ultimate facts that he intended to prove at trial, and never moved the trial court to reconsider its decision; instead, Shull took an interlocutory appeal to the Court of Appeals on the issue of intervention as of right. LF3.

3. Court of Appeals affirms denial of intervention

On appeal, Shull argued that the trial court had correctly decided he had a “personal interest” in the §116.190 litigation as political supporters of the petition, but had incorrectly decided that the State would adequately represent that interest. *See Prentzler v. Carnahan*, ___S.W.3d___ 2012 WL 985839 (Mo. App. W.D. Mar. 26, 2012) (no transfer or rehearing applied for or taken). The parties in *Prentzler v. Carnahan* were the same as those in this case (and were even represented by the same counsel until new attorneys entered their appearance for Shull just before the filing of briefs in this Court).

On March 26, 2012, the Court of Appeals affirmed the trial court and rejected

⁶ On January 3, 2012, Appellants did file additional pleadings related to Suggestions in Support of Motion to Intervene, but did not re-offer any exhibits or offer any additional exhibits into evidence prior to the time that their Motion was denied.

Shull's position, and because Shull failed seek reconsideration or transfer, a mandate issued. LF125. Shull's argument—identical to the one they assert at page 30 of their brief—was that “as signatories and supporters...they have a personal interest in the validity of the initiative petition, in seeing [it] circulated and qualified for the November 2012 ballot, and in having their signatures counted as valid.” *Prentzler*, 2012 WL 985389 *3. *Compare* Shull's Br. 30 (using almost identical language to describe their “personal interest”). After considering this argument, the Court of Appeals held that “Appellants have failed to establish that, as mere supporters and signatories of an initiative petition, they have a sufficient interest in the underlying §116.190 actions.” *Id.* The Court noted that §116.190 actions have a limited purpose, and that accordingly, “Appellants’ proposed interests in having their signatures count and qualifying the initiative for the ballot are not at issue in the underlying litigation.” *Id.* at *3-4.

The court further noted that:

Appellants have failed to show any such immediate or direct claim in the underlying Industry Suits, as they have not established how the outcome of those cases will cause them to incur any legal liability or directly affect their legal rights as supporters of the Consumer Credit Initiative Petition. Thus, it becomes inconsequential whether the State defendants adequately represent the interests of Appellants, as they have

failed to establish that they have a sufficient interest in the outcome of the underlying litigation by merely signing and supporting an initiative petition.

Id. at *5.

Despite “not[ing] that the trial court stated that a ‘citizen of this State who has differing political views...does have an interest in litigation concerning the Initiative” the Court concluded that “[o]pening intervention of right to citizens solely because they have a differing political view as to the ballot initiative would open the floodgates to oppressive intervention, and no public policy would be served.” *Id.* at *6.

4. Post-Appeal procedure and claims

Trial was held on March 27, 2012. As *amicus*, Shull had every opportunity to make legal arguments, and actually proffered oral argument and briefing on all of the issues, both legal and factual. TR250-55. During this time, Shull neither proffered, nor identified, nor referenced any other facts or factual arguments they would have made through independent witnesses or through cross-examination. *Id.*

Shull now claims that he would have submitted evidence that would have challenged the core assumptions of the fiscal note itself, arguing that a positive fiscal impact could be expected by capping rates at 36% and shutting down numerous lending businesses. Shull’s Br. 33-35. In the cases before this Court, Shull never pled any claim or defense that the fiscal note or summary actually understated the positive impact of the

petition. LF76-80. Signors' Supreme Court brief is the first time they have raised their new theories about how the 36% interest rate would actually lead to a positive fiscal note.

E. Ballot title litigation

The Secretary certified the official ballot title, which included the Secretary's Summary Statement and the Auditor's Fiscal Note Summary on August 9, 2011. LF50. Francis and Hoover filed their lawsuit challenging the official ballot title for Initiative Petition on August 19, 2011. LF3. Three other lawsuits were also filed. LF5.

1. March 27, 2012 Trial

The trial court tried the four cases in a single hearing and on a common record. LF5. The parties entered a Joint Stipulation. TR7. The Joint Stipulation described facts relating to the preparation of the summary statement, fiscal note and fiscal note summary. (Joint Stipulation, "JS"). The parties also offered four joint exhibits: the sample Initiative Petition (Ex.1), the letter from the Auditor to the Secretary of State regarding Attorney General approval of the fiscal note summary (Ex.2), the Fiscal Note (Ex.3), and the Certification of the Official Ballot Title (Ex.4).

The Court heard testimony from two experts, Dr. Joseph Haslag and Dr. Thomas Durkin. Dr. Haslag's analysis considered only title and payday lenders. *See* Ex.7. Dr. Haslag's economic analysis was undisputed by the Auditor. Dr. Durkin's analysis also considered installment ("510") lenders (Ex.14), and was largely undisputed by the Auditor as well.

a. Evidence regarding payday and title lenders

Dr. Haslag used two different methods to conclude that a 36% cap would put all payday (and title) lenders out of business. First, he researched the internal costs of payday lenders. TR125. He calculated the amount of interest that lenders would need to earn in order to stay in business and, using a widely-accepted formula, determined that a 36% APR would not come close to covering payday lenders' variable costs. *Id.* This would force rational lenders to immediately shut down or to go bankrupt. TR125-26; *see* Ex.3; Ex.7. Second, Dr. Haslag verified his calculations by researching the effects of 36% caps in other states and found that in fact, payday lenders had been forced out of business. Based on an internal Missouri Division of Finance email, he concluded that the same results would apply to title lenders. *See* Ex.3; Ex.7). Halwes testified that the Auditor independently investigated those conclusions and accepted them as reasonable, complete and accurate. TR24-25. Dr. Durkin also testified that this analysis was reasonable. TR195.

Dr. Haslag next calculated the state GDP contributed by payday and title lenders, which he had reported would be lost if these industries were eliminated. TR126-127. Dr. Haslag calculated the value of the credit provided by payday and title lenders, which, economically, is equal to the amount that lenders receive, and the amount that borrowers pay, for the credit. LF39. This totaled \$78.46 million in Year 1 and \$79.13 million in Year 2. LF43, Table B, row 1; TR146. On cross examination, Dr. Haslag testified that

capital had flowed into this industry because it is the best use of that capital, and that it could not be assumed that in fiscal Year 1 or 2, there were other Missouri industries with equal rates of return into which the capital would be reinvested. TR132. Halwes admitted that the Auditor accepted these conclusions as reasonable and Dr. Durkin's testimony was the same. TR24-25, 195.

Then, Dr. Haslag converted the lost GDP into lost tax revenues. Dr. Haslag testified that economists commonly use a figure of 3.8% to determine the total state tax revenues derived from a dollar of state GDP. TR128. Dr. Haslag testified that he had recently used this method to prepare an expert opinion on the fiscal value of the University of Missouri System to the state. TR129. Dr. Haslag concluded that the combined losses from the payday and title industries alone (not including "510 lenders") equaled \$2.98 million in Year 1 and \$3.01 million in Year 2. LF43, Table B, row 2. Halwes admitted that the Auditor accepted these conclusions as reasonable and Dr. Durkin's testimony was the same. TR24-25, 195.

Dr. Haslag next calculated the expected loss to the state unemployment compensation fund. First, Dr. Haslag determined the number of payday and title lender employees who would be affected. TR131. He then multiplied this by their expected benefits to reach a total of \$8.04 million for payday and \$10.08 million for payday and title combined. TR131-32; *see* LF43, Table A and B, row 3. Mr. Halwes admitted that he found the numbers to be reasonable, but testified that he refused to include or mention

them in the fiscal note summary because the unemployment compensation fund is not paid from the general revenue fund. TR45-46.

Dr. Haslag testified that the general revenue fund is replenished by taxing businesses, and that assuming that payday and title loan companies left the state, other companies would have to replenish the fund. TR132-35. This would itself have a fiscal impact, as corporate income would decrease by the amount of increased payments to the fund. TR134-35. Further, Missouri has borrowed money to keep the fund solvent, and interest payments will have to be made to the federal government. TR133. No witness disputed that there would be a fiscal impact from increased unemployment compensation payouts.

Dr. Haslag also calculated lost license fee revenue to the state using the Division of Finance's analysis. LF43. He determined that lost license fees totaled \$.59 million. LF43, Table B, row 4. He relied upon the Division of Finance's analysis indicating that the measure "would have a significant fiscal impact" because of license fee losses, even after staff was decreased by "4 or 5 examiners." LF44. Halwes did not dispute these figures or this method. However, Halwes testified that he considered the report of DIFP, the parent agency of the Division of Finance, which found "no cost or savings" because the lost revenue would be offset by lower expenses of regulation. TR27-28.

Dr. Haslag testified, in turn, that there was no data to support DIFP's disagreement with the Division. TR140-44. In fact, Dr. Haslag testified even firing 5 of the highest-paid

employees would not save enough in salary or benefits to come even close to covering the Division's lost revenue. TR140-44. Halwes could only answer that he did not try to obtain this information from DIFP, and his theory was of the lost revenue being offset was mere speculation. TR28. Even if, as Halwes suggested, the entire amount of license revenue losses (\$.59 million) could be offset by costs, and therefore offset against the lowest amount of payday and title revenue losses calculated by Dr. Haslag (roughly \$3.6 million, the sum of rows 2 and 4 in column 1 of Table B), the total lost revenues could be no lower than roughly \$3 million. TR145. Nonetheless, the summary claims that revenue losses as low as \$2.5 million might still be offset by cost reductions. Ex.3.

b. Evidence regarding 510 Lenders

Dr. Durkin testified, without opposition, that the 510 industry would shut down. TR188; Ex.14. Durkin testified the loss of these loans, which are primarily used to finance consumer purchases, would have the following effects: reduce state sales tax revenues in Year 1 and 2 by \$5.44 million; reduce income tax revenues by \$1.2 million in Year 1; reduce state sales tax revenues from former employees due to belt tightening by \$.845 million; increase unemployment compensation by \$6.6 million (using Dr. Haslag's methodology); and reduce business income tax revenues by \$.504 million. TR189-197; Ex.14. This would lead to a total Year 1 impact of \$14.589 million and a Year 2 impact of \$5.944 million. Ex.14. Based on the calculations of Drs. Haslag and Durkin, total loss to all three industries was estimated at over \$28 million. TR196-97.

c. Evidence regarding local impact

Halwes testified, “from Mr. Haslag’s information, it was clear...that there would be a local impact.” TR90. Dr. Haslag testified that local entities would have losses of at least \$122,000 based on a sampling of two cities. TR147.

Dr. Haslag testified that his calculations were only for state-level losses, but that business closures would have similar negative fiscal impacts on local entities. TR151-153. Mr. Halwes testified he understood that Haslag’s analysis included losses related to both state income tax and state sales tax. TR86. He also testified he was aware that at least two cities levied a local earnings (income) tax, and neither the fiscal note or fiscal note summary included this local impact. TR53-54, 73.

Mr. Halwes admitted that if, as he accepted as true, there would be lost GDP as a result of the proposed measure, that there would also be lost state sales tax revenue. TR64. Dr. Durkin testified that there would be parallel losses in local sales tax revenue. TR199-200. Halwes confirmed that there would be a “corresponding impact for local government sales tax revenue.” TR69:3-7. Halwes admitted that the fiscal note and fiscal note summary contained no “local impact” based on loss of local sales tax revenue. TR69.

Mr. Halwes admitted that the fiscal impact would have to increase once 510 lender and local impacts were added to the note. TR62; 69. In his testimony, Dr. Haslag concurred. TR152-53.

F. Judgment of the trial court

The trial court issued a single judgment in all four cases, which was subsequently amended. LF199-206. With respect to the Summary Statement, the court found the Secretary's summary "insufficient, unfair and likely to deceive voters." LF201. The court determined the exact percentage of the interest rate cap was "required in order for the signers of the initiative and voters to understand the purposes of the Initiative." LF202. The court certified a new summary statement as follows:

Shall Missouri law be amended to allow annual rates up to a
limit of 36% including interest, fees, and finance charges for
payday, title, installment, and consumer credit loans and
prohibit such lenders from using other transactions to avoid
the rate limit?

LF7.

With respect to the Fiscal Note and Fiscal Note Summary, the court found both to be inadequate and unfair, remanding them to the Auditor for preparation of a New Fiscal Note and Summary. LF203. The court found the fact that the measure would cause many businesses to close "undisputed." LF204. The court also noted the fact that Dr. Haslag's analysis did not include other types of lenders (in addition to payday and title lenders) that would be impacted by the initiative. LF204. The court explained that the Fiscal Note itself acknowledged that "510 lenders" would be negatively impacted by the proposed measure. LF204. The court noted that the Auditor admitted that the *Fiscal Note and Fiscal Note*

Summary contained no analysis of “510 lenders” or *local impact* and therefore held that they “insufficiently, unfairly, and significantly underestimate[d] the fiscal impact of the initiative.” LF204-05.

Finally, the court found that Francis and Hoover’s constitutional claims were unripe, and that all other claims of the Plaintiffs not specifically addressed in the judgment were found in favor of Defendants. LF206.

G. Post-Trial intervention

Rev. Bryan and Missourians for Responsible Lending (MRL) moved to intervene following the trial. (LF6). The trial court granted their motion. (4/10/12 TR42). Bryan and MRL also filed a motion to stay and/or vacate, which was subsequently denied. (LF8).

H. Signatures

Intervenors inappropriately suggest to the court that they have submitted enough signatures to meet the constitutional minimum needed to qualify for the ballot. This post-trial, *political* argument is not in the record, was not before the trial court, and is irrelevant to the issues before this Court.

POINTS RELIED ON⁷

X.

THE TRIAL COURT ERRED IN DISMISSING FRANCIS AND HOOVER'S CONSTITUTIONAL CLAIMS AS NOT RIPE, BECAUSE SUCH COUNTS ARE RIPE FOR ADJUDICATION, IN THAT THE CLAIMS FALL INTO AN EXCEPTION TO THE RIPENESS DOCTRINE BECAUSE (A) THE PROPOSED MEASURE IS FACIALLY UNCONSTITUTIONAL AS VIOLATIVE OF MISSOURI'S UNIFORM RATE PROVISION IN ARTICLE III, SECTION 44 OF THE MISSOURI CONSTITUTION AND (B) THE PROPOSED MEASURE IS FACIALLY UNCONSTITUTIONAL AS VOID FOR VAGUENESS, VIOLATIVE OF THE DUE PROCESS CLAUSES OF THE MISSOURI AND UNITED STATES CONSTITUTIONS.

Trotter v. Cirtin, 941 S.W.2d 500 (Mo. banc 1997)

State ex rel. Hazelwood Yellow Ribbon Comm. v. Klos, 35 S.W.3d 468 (Mo. App. E.D.

⁷ The first nine points (I-IX) of this brief either directly respond to the arguments raised by Appellants or state additional grounds for affirming the trial court's decision as to the insufficiency and unfairness of the Summary Statement, Fiscal Note, and Fiscal Note Summary.

2000)

Household Finance Corporation v. Schaffner, S.W.2d 734 (Mo. banc 1947)

Cocktail Fortune, Inc. v. Supervisor of Liquor Control, 994 S.W.2d 955 (Mo. banc 1999).

U.S. Const, 14th amend.

Mo. Const., art. III, §44

Mo. Const., art. I, §10

Section 370.300

XI.

THE TRIAL COURT ERRED IN DISMISSING FRANCIS AND HOOVER'S CONSTITUTIONAL CLAIMS AS NOT RIPE, BECAUSE SUCH COUNTS ARE RIPE FOR ADJUDICATION, IN THAT TAXPAYERS SHOULD NOT BE FORCED TO BEAR THE BURDEN AND EXPENSE OF HOLDING AN ELECTION ON A FACIALLY UNCONSTITUTIONAL MEASURE.

Household Finance Corporation v. Schaffner, S.W.2d 734 (Mo. banc 1947)

Cocktail Fortune, Inc. v. Supervisor of Liquor Control, 994 S.W.2d 955 (Mo. banc 1999).

State ex rel. Cranfill v. Smith, 48 S.W.2d 891 (Mo. banc 1932)

ARGUMENT

Introduction

This case arises from the insufficient and unfair ballot title and fiscal note prepared by the Secretary of State and the Auditor. The trial court correctly found that the fiscal note and fiscal note summary of the Auditor both were insufficient and unfair since they understated the fiscal impact of the proposed Anti-Payday Lenders petition by omitting (a) the impact on 510 lenders *and* (b) the local impact of the petition. The trial court properly remanded the fiscal note and fiscal note summary back to the Auditor for a new fiscal note and fiscal note summary. The trial court also correctly found that the summary statement portion of the ballot title was insufficient and unfair as it failed to state the main purpose of the proposed measure, which is a new 36% rate on certain lenders. The trial court corrected the summary statement and certified the new summary statement to the Secretary of State.

On appeal, the Appellants have failed to challenge the trial courts judgment on the fiscal note and fiscal note summary with respect to the understating costs to local governments (the local impact). By failing to bring this challenge, they have waived this issue and abandoned appeal on the fiscal note and fiscal note summary.

The Appellants then allege that the 510 lender information should not have been considered by the trial court. The Appellants failed to object to the testimony at trial and thus preserved no issue for appeal on 510 lenders. Even if the issue is before this court,

then the impact on 510 lenders was properly considered by the trial court and supports the decision that the costs were understated since that impact was omitted. The decision of the trial court is supported by facts, which were unobjected to by the Appellants, and this court should defer to those factual findings. Further, there are additional factual grounds in the record that support the finding that the fiscal note and fiscal note summary are insufficient and unfair.

The Appellants also challenge the trial courts' decision on the summary statement. Their challenge fails since the clear and most important purpose of the Anti-Payday Lenders Initiative is to fix a 36% interest rate on a certain group of lenders. The trial court properly held that the summary statement of the ballot title had to reflect this main purpose and found the omission of this purpose made the Secretary's summary statement insufficient and unfair. The trial court corrected this omission and should be affirmed.

Finally, the proposed Anti-Payday Lenders Initiative is facially violative of Article III, Section 44 of the Missouri Constitution (the Uniform Interest Rate provision) and is facially so vague as to be in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Since these facial violations are so open and plain, the trial court erred in finding these issues not to be ripe for adjudication. Since taxpayers will be forced to expend hundreds of thousands of dollars on an election over a plainly invalid proposal, this court should reverse the trial court by finding the constitutional claims are ripe, are correct and that the measure should now be declared

invalid.

In summary, the trial court's decision with respect to the insufficiency and unfairness of the fiscal note, fiscal note summary and summary statement is supported by facts developed on the record at trial, the proper legal analysis and thus those portions of the Final Judgment should be affirmed by this Court.

The trial court erred in holding that Respondents/Cross-Appellants constitutional claims were not ripe and that portion of the Final Judgment should be reversed by this Court and this Court should issue its mandate holding that the proposed measure is invalid as violative of the Missouri and United States Constitutions.

I.

THE TRIAL COURT'S DECISION SHOULD BE AFFIRMED ON THE GROUNDS THAT THE FISCAL NOTE AND FISCAL NOTE SUMMARY ARE INSUFFICIENT AND UNFAIR AS A RESULT OF THE AUDITOR'S FAILURE TO CONSIDER LOCAL IMPACT OF THE PROPOSED MEASURE AS THAT BASIS FOR THE TRIAL COURT'S DECISION WAS NOT CHALLENGED BY THE STATE OR INTERVENORS AND THEREFORE HAS BEEN ABANDONED.

The trial court, in its Final Judgment, found that the Fiscal Note and Fiscal Note Summary were insufficient and unfair by understating the impact of the proposed measure for two reasons: (1) the failure of the Auditor to calculate the impact to the state of proposed measure upon 510 Lenders; *and* (2) the failure of the Auditor to calculate and state the local impact of the proposed measure. The State⁸ and the MRL have raised allegations of error only on the first basis (510 lenders). None of the Appellants have alleged that the trial court's Final Judgment is in error with respect to the local impact basis of the Final Judgment.

A. Standard of Review Does Not Exist

There is no standard of review when an appellant has failed to preserve an issue

⁸ "State" refers to both Carnahan and Schweich; "MRL" refers to Bryan and Missourians for Responsible Lending.

for appellate review.

B. None of the Appellants have alleged that the trial court's Final Judgment is in error with respect to the local impact basis of the Final Judgment

Rule 84.13 lays out the requirements for an Appellant to preserve error and raise it before an appellate court in a civil appeal:

Apart from questions of jurisdiction of the trial court over the subject matter and questions as to the sufficiency of pleadings to state a claim upon which relief can be granted or a legal defense to a claim, *allegations of error not briefed or not properly briefed shall not be considered in any civil appeal...*

Rule 84.13(a) (emphasis added). In the Appellants' Briefs, there is no mention or argument that the Fiscal Note and Fiscal Note Summary do properly include the local impact of the proposed measure. To wit, the State's Brief reads "The *only* issue is adequacy (or sufficiency of the fiscal note due to the supposed lack of analysis on the issue of fiscal impact on the 510 lenders." St. Br. at 18 (emphasis added). Since this issue is a separately stated and individually identified basis of the judgment and is not argued in any Appellants' Brief it is deemed abandoned by the Appellants and cannot be considered by this Court.

Under §116.190 the sole and exclusive remedy if a fiscal note and/or fiscal note summary is found to be insufficient and/or unfair is remand to the Auditor for a new

fiscal note and fiscal note summary. In this case, even if the Appellants are correct that the 510 lender issue is not a sufficient basis for the trial courts's determination of insufficiency and unfairness, they have abandoned the local impact basis of the Final Judgment. Thus, the Fiscal Note and Fiscal Note Summary are still, even if Appellants are successful on appeal, insufficient and unfair on the basis that they contained no analysis of local impact and must be remanded to the Auditor.

With respect to the trial court's Final Judgment on the Fiscal Note and Fiscal Note Summary, Appellants' appeal should be dismissed or this Court should affirm the trial court's judgment finding them insufficient and unfair and remanding the same to the Auditor under §116.190.

The Western District of the Court of Appeals has looked at the effect of an Appellant who does not challenge all the bases for a trial court's judgment on appeal. In *Arch Insurance Company v. Progressive Casualty Insurance, Inc.*, 294 S.W.3d 520 (Mo.App.W.D. 2009), the Court was faced with an appeal that did not raise error with all the bases for the underlying judgment. The court noted:

While it may not be stated explicitly in Rule 84.04, the fundamental requirement for an appellate argument is that it demonstrate the erroneousness of the basis upon which a lower court or agency issued an adverse ruling.

Id. at 524 (quoting *Rainey v. SSPS, Inc.*, 259 S.W.3d 603, 606 (Mo.App.W.D. 2008)).

The Western District then “because of the patent deficiencies in Arch’s Points Relied On and Argument” dismissed Arch’s appeal. *Id.*

In *Rainey*, the Western District dismissed the appeal for failure to challenge the grounds for the underlying ruling:

Unless an appellant challenges the grounds on which an adverse ruling depends, he has shown no entitlement to appellate relief. *See Waller [v Shippey]*, 251 S.W.3d. [403,] 406, n.5 [(Mo.App.W.D. 2008)] (noting a similar lack of connection between appellant’s arguments and the grounds upon which a lower court issued an adverse ruling);

Rainey, 259 S.W.3d. at 606.

This Court has similarly ruled that not attacking a particular part of a judgment would result in that part of the judgment being affirmed. *Ellis v. Farmer*, 287 S.W.2d 840, 852 (Mo. 1956). The Western District expounded on this statement of law:

On appeal, the Brownings [Appellants] do not challenge the court’s nuisance finding but instead limit their argument to zoning and affirmative defense issues. The absence of appellate argument on the nuisance issue suggests the Brownings have conceded and abandoned this point. The Court need not consider points not raised in appellants

brief...Moreover, this court may affirm the judgment on the nuisance issue alone since, “the judgment of the trial court must be affirmed if it is correct on any theory”...The Brownings’ failure to argue the nuisance issue leaves that issue as an independent basis for affirmance.

City of Lee’s Summit v. Browning, 722 S.W.2d 114, 115 (Mo.App.W.D. 1986) (internal citations omitted).

In the current matter, Appellants have failed to challenge the trial court’s decision that the Fiscal Note and Fiscal Note Summary contained no analysis of local impact and that the stated “costs” in the fiscal note and summary would have to increase if local impact were added to the note. LF204. In failing to challenge this point, their appeal of the portion of the Final Judgment declaring the Fiscal Note and Fiscal Note Summary insufficient and unfair and remanding the same to the Auditor must be dismissed.⁹ The decision of the trial court on the insufficiency and unfairness of the Fiscal Note and Fiscal

⁹ The Appellants will, with almost certaintude, raise the argument against the judgment on the local impact side in their Reply Brief after reading this section. However, error first raised by an Appellant in its Reply Brief is not preserved for review and this Court will not entertain such late raised, new challenges to the judgment. *See Berry v. State*, 908 S.W.2d 682, 684 (Mo. banc 1995).

Note Summary should be affirmed.

II.

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE EVIDENCE OF FISCAL IMPACT PRESENTED AT TRIAL WAS ACCEPTABLE IN THAT THE CITIZEN/PLAINTIFFS MUST HAVE A FORUM TO MAKE A FULL EVIDENTIARY RECORD ON THE INSUFFICIENCY AND UNFAIRNESS OF A FISCAL NOTE AND FISCAL NOTE SUMMARY BECAUSE SECTION 116.190 EXPRESSLY PROVIDES FOR SUCH A RECORD AND NO PROVISION OF THE CONSTITUTION OR STATUTES OR ANY VALID PUBLIC POLICY BARS OR LIMITS THAT EVIDENTIARY RECORD AT TRIAL OR REQUIRES PRIOR SUBMISSION OF THAT EVIDENCE TO THE AUDITOR.

(Responds to State's Brief Point III AND MRL Brief Point I)

A. Standard of Review is *de novo*

The applicable standard of review for appeals of court-tried civil cases is found in *White v. Director of Revenue*, 321 S.W.3d 298, 307-308 (Mo. banc 2010). The issue of whether prior submissions are required to be filed with the Auditor prior to maintaining an action is an issue of law. This Court applies *de novo* review to questions of law decided in court-tried cases. *Id.* at 308. Questions of law are reviewed “independently [and] without deference to [the trial court's] conclusions.” *Moore v. Bi-State Dev. Agency*, 132 S.W.3d 241, 242 (Mo. banc 2004).

B. Appellants failed to preserve this issue by timely objecting at trial

The State has failed to preserve this issue for appeal by failing to object to such evidence at trial. The only objections made to Dr. Durkin's testimony were on the basis that his opinion lacked foundation and he was testifying on matters of law, which the court subsequently overruled. 3/27/12 TR201:9-20. No objections were made on the basis that the evidence presented by Durkin at trial was improper or barred because it was not submitted to the Auditor under §116.175. Such objection was waived by the Auditor at trial and was not properly preserved for appeal. As a result such arguments must be rejected as not properly before this Court. *See, e.g., Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 97 (Mo. banc 2010).

C. The Controlling statutes contain no prohibition on the trial court's receipt or consideration of evidence of the fiscal impact

The plain language of the statute is clear: "Any citizen who wishes to challenge the...fiscal note...may bring an action in the circuit court of Cole County." §116.190.1, (emphasis added). The petition is only required to "state the reasons why the fiscal note or the fiscal note summary portion of the official ballot title is insufficient or unfair and...request a different fiscal note or fiscal note summary [.]". The court is directed to "consider the petition [and] hear arguments." §116.190.4. This Court has consistently found that, in the absence of ambiguity, the plain language of a statute is controlling. *See, e.g., Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. banc 2010). No further analysis

is necessary, as the plain language of §116.190, does *not* require pre-filing of comments with the Auditor in order to maintain a suit challenging the fiscal note and fiscal note summary.

An even closer review of the plain language of the relevant fiscal note statutes—§§116.175 and 116.190—reaches the same conclusion. It reveals certain bedrock requirements and duties for the Auditor and for the trial court. The process is simple and it is familiar. It follows a basic pattern that is part and parcel of our modern administrative state, and looks no different from any other transaction between the executive and judicial branch. First, the Auditor prepares the fiscal note. Second, the trial court reviews the Auditor’s work product under a specific statutory standard. The statutes spell out the details, and none of them limit the evidence the trial court may consider in determining the sufficiency and fairness of a fiscal note or fiscal note summary.

1. The Auditor’s duties

The Auditor must comply with three core requirements that are mandatory and central to his function, along with several other procedural guidelines.

The Auditor “shall assess the fiscal impact of the proposed measure.” §116.175.1. Regardless of the process used by the Auditor, his finished product must constitute an “assessment,” it must address “fiscal impact,” and it must relate to the “proposed measure.”

The Auditor “shall prepare a fiscal note and a fiscal note summary,” and they

“shall state the measure’s estimated cost or savings, if any, to state and local governmental entities.” §116.175.2.

The Auditor’s summary “shall summarize the fiscal note in language neither argumentative nor likely to create prejudice either for or against the proposed measure.” §116.175.3. Relatedly, neither the summary nor the underlying fiscal note may be “insufficient” or “unfair.” §116.190.3. This third requirement has engendered the most litigation, but the decisions agreed long ago that the ordinary meaning of these terms are that the summary and note cannot be (1) “inadequate; especially lacking adequate power, capacity, or competence” or (2) “marked by injustice, partiality, or deception.” *See Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d 451, 456 (Mo.App.W.D. 2006).

The only other requirements are procedural: the fiscal note summary may not exceed fifty words; any proponents or opponents “may” submit a “proposed statement of fiscal impact” to the Auditor provided that they do so within ten days of the Auditor’s receipt of the measure; the Auditor must finish his fiscal note and summary and send it to the Attorney General for approval within twenty days after receiving the petition; and the Attorney General has ten days to review and “approve the legal content and form” of the fiscal note summary. §116.175. The Auditor also “may consult with” state or local entities or “others with knowledge pertinent to the cost of the proposal.” §116.175.1.

Nowhere do the statutes provide that the Auditor is excused from rendering a

sufficient or fair note or summary because no person qualifying as a “proponent” or “opponent” came forward to submit a qualifying “statement of fiscal impact” within ten days. Nor do the statutes provide that the Auditor can avoid his duty to render a fair and sufficient statement of the fiscal impact of the measure, addressing both state and local entities, merely by choosing not to contact (or by making little or no effort to contact) those with “pertinent” knowledge. While the statutes provide helpful guidance about the sources the Auditor might choose to mine, they do not make those contacts conditions precedent to his duty to comply with the three bedrock requirements of §§116.175 and 116.190. By the same token, they do not allow the Auditor to dilute the requirements of his duties simply by “dumbing down” his inquiry and limiting his sources of information.

2. The court’s duties

The court’s duties are also clearly articulated. It “shall consider the petition, hear arguments, and in its decision, either certify the fiscal note or the fiscal note summary portion of the official ballot title to the secretary of state or remand the fiscal note or the fiscal note summary to the auditor for preparation of a new fiscal note or fiscal note summary...” §116.190.4.

Section 116.190 provides no restriction whatsoever on the trial court’s receipt of evidence or on the factual record litigants may provide for the court’s consideration. Nor does the statute require that the court limit its review to the materials—however

limited—the Auditor either took the time to find or chose to receive.¹⁰

3. The absence of a pre-filing requirement was the result of a deliberate legislative choice that should not be reversed by this court

The General Assembly, when enacting the provisions of §116.190 in 1980 could have written the statute to either bar opponents that did not submit statements of proposed fiscal impact to the Auditor from challenging the fiscal note, or to bar opponents from raising any issues or presenting any evidence that was not presented to the Auditor under §116.175. It did not do so. The general assembly could have added such provisions when §116.190, was amended in 1985, 1993, 1997, 1999, or 2003. Again, it did not. Even this year, several pieces of legislation making changes to this very section were before the legislature, but did not pass.¹¹

While Appellants argue that the law *should* be that evidence not presented in

¹⁰ Despite the plain language of both statutes applying to two distinct and separate stages of the process, preparation of the fiscal note and judicial review, MRL claims that Sections 116.175 and 116.190 need to be “harmonized.” *See* MRL Br. 40-42. But there is no need to “harmonize” statutes that do not apply to the same thing and that are not actually in conflict. Adding such a requirement would be judicial legislation based on policy preferences, not the “harmonizing” of apparently disparate provisions.

¹¹ *See* Mo. H.B. 1869, 96th Gen. Assembly, 2d Sess. (Feb. 29, 2012); Mo. S.B. 671, 96th General Assembly, 2d Sess. (Jan. 17, 2012).

§116.175.1 should be excluded from §116.190 litigation, that argument *should* be made to the general assembly, not the court. This Court has held that these types of policy decisions are best left to the general assembly. *First Bank v. Fischer & Frichtel, Inc.*, ___S.W.3d___, 2012 WL 1339437. *6 (Mo. banc 2012). While Appellants may desire amendments to §116.190 the plain language of §116.190 is clear and neither requires fiscal note challengers to have submitted proposed statements of fiscal impact to the Auditor nor bars the court from hearing such evidence at trial.

The experience of Oregon provides an instructive contrast. There, the legislature made the type of change that the State and MRL have suggested. Prior to 1985, ORS 250.085 was very similar to §116.190, however, in 1985 Oregon changed its ballot title challenge statute to read:

(2) Any person dissatisfied with the ballot title for an initiated or referred measure certified by the Attorney General *and who timely submitted written comments on the draft ballot title* may petition the Supreme Court seeking a different title...

...

(5) When reviewing a title prepared by the Attorney General or by the Legislative Assembly, *the court shall not consider arguments concerning the ballot title not presented in writing to the Secretary of State...*

ORS 250.085 (emphasis added).¹² The Oregon Supreme Court explained the import of these changes:

[S]ubsections (2) and (5) of ORS 250.085 were added to Oregon statutes [in 1995]. The purpose of these new provisions, as evinced by their language, was to remove from the judiciary and concentrate in the administrative branch the process of arriving at an appropriate title for ballot measures. In order to accomplish this purpose, the legislature requires something more than mere participation in the comment process in order to maintain a later challenge to a ballot title in this court...

Kafoury v. Roberts, 736 P.2d 179, 181 (Or. banc 1987). The Oregon legislature amended their ballot title challenge statute to “avoid the possibility of a person’s intentionally waiting until the matter is before this court to raise meritorious objections that could have

¹² The italicized language cited was entirely new. Prior to this change, the relevant part of ORS 250.085 stated:

Any person dissatisfied with a ballot title for an initiated or referred measure filed with the Secretary of State by the Attorney General or Legislative Assembly, may petition the Supreme Court seeking a different title and stating the reasons the title filed with the Court is insufficient or unfair.

been raised and resolved at the administrative level.” *Id.* at 181-82.¹³ It is clear that the State and MRL desire that Missouri’s legislature do the same as Oregon. Unfortunately for the State and MRL, this court cannot compel them to do so, and is constrained by the plain language of the statute.

**D. The Auditor himself fails to follow the plain language of §116.175 that he insists e
used to bar Missouri citizens from seeking judicial relief**

The State’s argument is further weakened by the admission of the Auditor’s Office that not even they follow §116.175, or the regulation promulgated thereunder. At the very least, it is disingenuous for the Auditor to use the plain language of §116.175, in an attempt to bar citizens from bringing forth information that may be of importance to voters despite it being past the statutory ten day deadline, when the Auditor doesn’t adhere to the statutory deadline.

The Auditor’s corporate representative, Jon Halwes, admitted that he ignores the ten-day deadline found in §116.175. Pl. Ex. 9 at 15. He has further admitted he does not review proponents or opponents submissions of statements of fiscal impact to ensure they comply with GASB standards as required by §116.175. Ex.9 at 15. In addition, he has

¹³ The Oregon legislature also mandates that the Secretary of State give adequate public notice when a proposed initiative is received. ORS 250.067. In Missouri, no such requirement exists; quite the opposite neither the Secretary of State nor the Auditor issue any public notice upon receipt of a proposed initiative petition.

admitted he does not rely on or follow 15 CSR 50-5.010, the regulation promulgated by the Auditor that purportedly governs submission of proposed statements of fiscal impact. Ex.9 at 15. Halwes stated “[T]here is no requirement [in §116.175] that says that if it comes in after that point, it cannot be included [in the fiscal note].” Similarly, in §116.190 there is no requirement that if information comes in after that point, or after the preparation of the fiscal note, that it cannot be evidence at trial.

E. The existing statutory scheme does not require this court to judicially engraft new requirements

It would make no sense for this Court to judicially engraft new statutory requirements, imposing a straightjacket on the reviewing trial court and essentially placing the Auditor in complete control of the record on review.

1. The Auditor is in the best position to develop the record, but is also in the best position to deprive concerned citizen-plaintiffs of a means of review

The Auditor claims unfettered discretion under §116.175.1, in deciding which agencies to contact for comments—or to contact no agencies at all. By exercising this claimed prerogative to exert minimal information-compiling efforts, the Auditor could control the record, suffocate any serious review of his summary, and effectively circumvent the “insufficient and unfair” standard, depriving concerned citizens of any means to hold the Auditor to the substantive requirements of §§116.175 and 116.190.

It is no answer that citizen-plaintiffs can simply create their own record by filing

statements with the Auditor within ten days. First, only an avowed “proponent” or “opponent” may file a “statement of fiscal impact.” §116.175.1. A citizen-Plaintiff who does not fall in either category will not have that opportunity.

Second, the “proponent’s” or “opponent’s” statement must meet various technical requirements, including the standards of the “governmental accounting board” and of §23.140. Significantly, the Auditor makes no public announcement when he receives an initiative petition from the Secretary and the 10-day clock begins to run. For opponents, this can make assembling a complete and technically conforming statement exceedingly difficult if not impossible. *See* MRL Br. at 46 (claiming that MRL “were forced to rely on the Auditor,” and “had no input” into the preparation of the fiscal note because they failed to file fiscal impact statements).

Finally, proponents and opponents have less access to state governmental entities than does the Auditor. While proponents and opponents can try to quickly “sunshine” public entities pursuant to Chapter 610, the statute allows agencies to wait three days to respond, and (often) to wait even longer to actually produce documents. §610.023.3. The Auditor is much more likely to receive agencies’ public records under Chapter 610 within 20 days than are proponents and opponents to receive the same records within just 10 days, especially when it takes them a few days to learn that the Auditor has received the sample petition and that the 10-day clock is running. Further, the Auditor is a repeat player in the fiscal note process, has the power to audit many public entities, and is much

more able than proponents or opponents—let alone a §116.190 citizen-plaintiff who is neither a proponent or opponent—to develop the record.

2. The development of a full record at the trial court is recognized by the courts

The trial court’s adjudication of the sufficiency of a petition is “a matter of original evidence” and is not restricted to the record before the Secretary of State. *See Ketcham v. Blunt*, 847 S.W.2d 824, 830 (Mo.App.W.D. 1992) (the Secretary of State makes “the ultimate administrative determination as to whether the petition complies with the Constitution of Missouri and with the statutes,” but “it is the courts who are charged with the ultimate judicial determination as to whether...the petition is sufficient...”) *Ketcham* approved the trial court’s consideration of additional evidence regarding the sufficiency of signatures that was not before the Secretary of State by the time he had certified the number of signatures in the petition, reasoning that the “ultimate question” of signature validity “was a matter of evidence in the circuit court.” *Id.* at 831.

When the Auditor purports to “assess” the fiscal impact of an initiative, he fixes mandatory content for (1) the petitions that Missouri voters have a legal right, duty, and privilege to circulate among themselves and, whether “pro” or “con,” use in their pre-election political debate; and (2) ballots that voters have a legal right, duty, and privilege to use at the polls if sufficient numbers of voters sign the petition. The Auditor conducts no hearing in determining these legal rights, duties, or privileges, and absent §116.190 there would be no other means of judicial review.

Without analyzing the parallel to §116.190 the *Ketcham* court reached the same conclusion with respect to the Secretary of State's conclusions on signature validity. Citizen-plaintiffs must have some forum for proving whether the Auditor has fairly and sufficiently estimated the fiscal impact of a proposal, and that forum is the trial court.

3. The real danger to the fiscal note process is the Auditor's failure to conduct a *bona fide* assessment

Appellants claim to be concerned that parties will "withhold information" from the Auditor during the 10-day period, and then use it at trial to prove the fiscal note or summary is insufficient or unfair. This concern misunderstands the fiscal note process and completely ignores the real danger: the Auditor's own failure to conduct a *bona fide* assessment.

Appellants' purported concern is actually quite limited in scope; it can only apply to citizen-plaintiffs who also learned of the filing of the petition and qualified as "opponents" or "proponents" of the initiative. In contrast, §116.190 plaintiffs who merely have an interest in ensuring that the Auditor and Secretary of State do their duty in preparing the ballot title, but who do not oppose or propose the petition (or who weren't able to make an informed decision within ten days if they happened to learn that the petition had been received by the Auditor) have no right to submit materials to the Auditor for his consideration under §116.175.1. The Auditor only recognizes submissions in terms of a "proponent" or "opponent," neither "solicits" nor "takes" "public

comments” on proposed fiscal notes. 3/27/12 TR17:1-10. Thus, there is no opportunity for plaintiffs who were not proponents or opponents to have “withheld” information.

Appellants seriously mischaracterize the process. Information regarding the fiscal impact of proposed legislation on state and public entities is almost entirely public information. It is information that is (or should be) in the possession of the governmental agencies surveyed by the Auditor. Plaintiffs can have no secret “information” about the workings of government that they “withhold” from an officer of the government. If the staff of the Auditor’s office is performing a *bona fide* “investigation” within the office’s constitutional authority and competence when it prepares fiscal notes, then private parties should not be able to “surprise” the Auditor with information (or, as in this case, mere logical reasoning) about the workings of the same agencies and political subdivisions the Auditor audits.

In this case, the facts showed that within 10 days of receiving the petition, the Auditor learned that an entire category of lenders (“510” lenders) had not been included in the final analysis of DIFP. TR61:5-62:20. The Auditor learned this not through his own efforts, but because an opponent, Dr. Joseph Haslag, used the Sunshine Law to uncover an internal electronic communication within the Missouri Division of Finance, the division of DIFP which regulates “510” lenders. TR61:25-62:14; *see also* Ex.7. The communication mentioned that a sizable portion of “510” lenders would close. *Id.*

The Auditor could have used the same process as Dr. Haslag to uncover these documents. Indeed, the Auditor did not even need to use the Sunshine Law because his staff had a working relationship with the agency, as it has with all agencies. TR77:25-79:6. Halwes admitted that he merely spoke with an agency employee about how a private party was able to sunshine its internal communications, but incredibly, he made no effort to follow up on the analysis or ask it if was true. TR62:8-63:19. Halwes admitted that he performed no independent analysis whatsoever. TR36:1-9. How can the Auditor claim “surprise” and “sandbagging” when the facts show he was confronted with the facts within the first 10 days of his 20-day review? Sadly, this argument is merely a cover for the Auditor’s own negligence.

The governmental cost and revenue information the Auditor seeks is uniquely in the possession of state and local entities he audits—not with third parties. At worst, the information is equally available to everyone through the Sunshine Law or through minimal effort to pull from public sources.¹⁴

¹⁴ MRL seriously miscasts the opinion of Dr. Durkin, as based primarily on “data provided to him by 510 lenders and consumer survey information he had obtained from the Federal Reserve Board.” MRL Br. 22. In fact, Dr. Durkin’s primary data source was Missouri’s Division of Finance, which issues a report available online detailing the dollar value of loans extended by “510” lenders. TR190:15-192:9; 195:17-25. The only portion of Durkin’s opinion which relied on information from “510” lenders was his

The real danger is not that private parties will take the extremely risky course of undertaking onerous efforts to quickly acquire the government's own fiscal information and then "withhold" it from the government in the hope of a highly speculative litigation payoff months down the road. Rather, it is that the Auditor continues to paste together mere compilations of others' submissions, passing off the "summary" of the compilation as if it were an informed analysis of fiscal impact like the ones compiled under §23.140, by the Committee on Legislative Research.

F. Appellants confuse the Court of Appeals' limited holdings regarding the sufficiency of the Auditor's discretionary process with the question of whether the end result of that process is sufficient and fair under §116.190

Appellants' analysis incorrectly assumes that the Auditor's unwritten two-step process of (1) pasting submissions verbatim into the fiscal note, and then (2) summarizing those submissions, has been blessed for all time by two court of appeals decisions. This assumption that most "510" lenders are not so large that they could come close to surviving a 36% cap (TR187:4-189:6), and that approximately 2,200 workers are employed in the industry. TR192:10-193:5. Neither input was critical to Durkin's testimony or ultimate conclusion of a \$14.5 million fiscal impact, and as the circuit court pointed out, the real issue is not whether the Auditor adopted Durkin's precise number, it is the Auditor's failure to make any calculation or draw any conclusion regarding "510" lenders at all. *See* LF206-208.

“process” appears nowhere in the statutes and Appellants seriously misread the applicable case law.

Mr. Halwes is unaware of why the Auditor’s office long ago decided to simply paste submitters’ responses into the fiscal note verbatim, “no matter what they say.” TR21:4-25. When receiving submissions from proponents or opponents, the Auditor performs only a perfunctory review to make sure no pages or numbers are missing and to ensure the submission relates to the petition and is therefore “reasonable.” TR80:10-24. The Auditor’s office does not follow the rules it promulgated for such submissions. TR14:1-25. Mr. Halwes uses his own subjective judgment in deciding whether to follow up on a response. *See* TR74:20-75:13.

As the Auditor now openly admits, this process “does not at any point require the Auditor to summarize or explain his analysis,” (St. Br. 33), and indeed, does not even require the Auditor to perform “his own independent analysis” at all. St. Br. 40. *See also* TR95:16-20 (Halwes did not do “any independent analysis” in preparing “the actual wording for the fiscal note summary.”). Instead, Halwes simply decides to “summarize” the points he “believe[s] are important for the public.” TR84:11-13. Nonetheless, Appellants argue that fiscal notes and summaries that follow this “process” are immune from attack.

This reasoning misapplies the holdings of the court of appeals cases. *See Mo. Municipal League v. Carnahan*, 303 S.W.3d 573 (Mo.App.W.D. 2010) (“*MML I*”); *Mo.*

Municipal League v. Carnahan, 2011 WL 3925612 (Mo.App.W.D. 2011) (trans. denied Dec. 20, 2011) (“*MML II*”). The latter case, *MML II*, merely held that the Auditor did not need to promulgate his fiscal note procedures (such as they were) as rules. In *MML I*, the court accepted as true that the Auditor performed a three-step process:

- (1) placing entities’ responses in the fiscal note if they are reasonable and complete;
- (2) obtaining clarification from the entity if the responses are unclear; and
- (3) if responses are unreasonable, placing less weight on the response in the fiscal note summary.

Id. at 582. The court merely held that §116.175 “does not mandate that the Auditor adopt *another method of independently assessing* the costs or saving of the proposal.” *Id.* (emphasis added). The court did *not* hold that every time the Auditor undertakes this three-step process, its result must be deemed sufficient or fair under §116.190 or that reviewing courts cannot look to the true facts regarding a proposal’s fiscal impact in deciding whether the Auditor’s work product is “sufficient and fair.” Indeed, even after disposing of the attack on the Auditor’s process, the court apparently examined the record, finding that “there is nothing in the record indicating the public will be misinformed of the fiscal impact” of the proposals. *Id.*

Further, it is significant that the court seemed to believe that the Auditor

nonetheless “independently assess[es]” the costs or savings of the proposal. *Id.* at 582. As discussed above, however, the facts of this case are different: Halwes admitted that he had made no independent analysis. Even after talking to the entity that failed to include “510” information, in contrast to the entity’s internal document transmitted to the Auditor by Dr. Haslag, Halwes made no effort whatsoever to address “510” lenders. Whatever the merits of *MML I* and *II* in interpreting §116.175, this case presents far different facts, and as the trial court found, those facts indicate that the fiscal note and summary are insufficient and unfair under §116.190.

G. If the Constitution requires any particular construction of § 116.190, it is to allow the compilation of a full record in the trial court

If the Missouri Constitution has any application to the trial court’s judicial review of the Auditor’s fiscal note decision under §116.190 it should be to allow citizen-challengers to develop a full record. *See* Mo. Const. Article V, Section 18. “All final decisions, findings, rules and orders on any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record.” *Id.*

Because there is no opportunity for a hearing before the Auditor, and only

“opponents” and “proponents” have a right to make submissions, plaintiffs who merely have an interest in an accurate fiscal note and ballot title would be completely frozen out of the process if they have no chance to develop a record before the trial court. For a variety of reasons, allowing citizen-plaintiffs to fully develop the record is the fairest rule. *See* Section II.E, *infra*.

MRL nonetheless argues that the constitution *requires* denying citizen-plaintiffs the right to fully develop a record in the trial court. Surely the argument that third parties have a “right” to block plaintiffs from introducing evidence is a constitutional rarity, and not surprisingly, MRL’s argument makes several logical and legal leaps.

As initial matter, MRL is correct that the initiative process is “participatory democracy in its purest form.” MRL Br. 43. However, this hardly justifies denying citizen-plaintiffs with a statutory and constitutional interest in a “sufficient” and “fair” initiative process the right to rely on something other than “statements” submitted within a short 10-day window by “opponents” or “proponents.” Even if plaintiffs are also “opponents” who found out about the petition at some point before the 10-day deadline but failed to submit a statement to the Auditor, the information in the statements is generally public information to which the Auditor has equal or greater access.

Additionally, MRL’s complaint that plaintiffs’ ability to submit evidence in a §116.190 challenge is a “virtual veto” over ballot measures wildly overstates reality and the factual record in this case. First, any plaintiff who learns of a petition and fails to

submit information to the Auditor has little incentive to take the risk of remaining silent; the mere absence of information in the fiscal note, while not dispositive, may cause the trial court to doubt that a diligent Auditor should have uncovered it himself. (Of course, that is not the case here, as the Auditor *did* receive notice of the impact on “510” lenders and failed to undertake any investigation or analysis).

Second, on the facts of this case, the MRL Appellants were in the best position to submit a statement on time, but chose to “rely on the Auditor” and not give any input. MRL Br. 46. Further, setting aside MRL’s wildly inaccurate and subjective summary of events at trial (with no citations to the record) it was mere happenstance that Dr. Durkin was not disclosed in discovery. That is due to the litigation strategy the State defendants employed in this particular case, not to a constitutional defect in §116.190.

Finally, MRL finally resorts to hyperbole, claiming that “§116.175.1’s unambiguous time limits [were] not enforced in this case.” MRL Br. 47. As discussed above, §116.175 applies to the deadline for “proponents” and “opponents” to submit statements in a particular form; it does not apply to the evidence that citizen-plaintiffs may introduce in §116.190 proceedings. In sum, the statutory requirements are clear and fair and need not be altered. If anything, the Constitution and the integrity of the initiative process requires that the otherwise-unsupervised acts of the Auditor in preparing mandatory content for petitions and ballots be subject to careful review on a full record.

III.

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE FISCAL NOTE AND FISCAL NOTE SUMMARY ARE INSUFFICIENT AND UNFAIR ON THE GROUNDS THAT THE FISCAL NOTE AND FISCAL NOTE SUMMARY DID NOT INCLUDE ANY OF THE FISCAL IMPACT ON 510 LENDERS.

(Responds to State's Brief Point IV)

The trial court correctly found that the Auditor did not consider and include in the fiscal note the effect of the initiative petition on 510 lenders. The state claims that this is not *factually* accurate. The State bears a heavy burden to show that the trial court erred based on fact issues. They have not carried this burden and thus the trial court should be affirmed.

A. The Standard of Review is *de novo* for questions of law and *deference* to the trial court on contested issues of fact

The applicable standard of review for appeals of court-tried civil cases is found in *White v. Director of Revenue*, 321 S.W.3d 298, 307-308 (Mo. banc 2010). The judgment of the trial court will be affirmed “unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law.” *Id.* at 307-08 (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo banc. 1976)).

The determination of the court as to whether the Auditor's Fiscal Note and Fiscal

Note Summary was insufficient or unfair was, in part, a determination of law. This Court applies *de novo* review to questions of law decided in court-tried cases. *Id.* at 308. Questions of law are reviewed “independently [and] without deference to [the trial court’s] conclusions.” *Moore v. Bi-State Dev. Agency*, 132 S.W.3d 241, 242 (Mo. banc 2004).

The determination of the court as to whether Auditor’s Fiscal Note and Fiscal Note Summary was insufficient or unfair was, in part, a determination of contested fact. Evidence is contested when one “dispute[s] a fact in any matter.” *White*, 321 S.W.3d at 308. A factual issue is contested when party presents contradictory or contrary evidence, through cross-examination, through pointing out internal inconsistencies in the evidence. *Id.* The role of the appellate court is not to “re-evaluate testimony through it own perspective” but rather, the court “confines” itself to the standard set forth in *Murphy v. Carron*. *Id.* at 309. “Appellate courts defer to the trial court on factual issues ‘because it is in a better position not only to judge the credibility of witnesses and the persons directly, but also their sincerity and character and other trial intangibles which may not be completely revealed by the record.’” *Id.* at 308-09 (quoting *Essex Contracting Inc. v. Jefferson Cnty.*, 277 S.W.3d 647, 652 (Mo. banc 2009)). In addition, fact issues without specific findings in the judgment are considered on appeal as being have found in accordance with the result reached (here that the fiscal note and fiscal note summary are insufficient) and this court will affirm the trial court’s judgment if it is correct on any

reasonable theory supported by the evidence. *Safeco Ins. Co. of America v. Stone & Sons, Inc.* 822 S.W.2d 565 (Mo. App. E.D. 1992).

**B. Facts determined by the trial court which should be given deference by
this court**

The trial court found that both Drs. Haslag and Durkin were “well qualified and highly credible” and “experts in the field of economics.” LF203. The court found they that “relied on facts and data reasonably relied upon by experts in their fields, and the facts and data upon which they relied were otherwise reasonably reliable.” LF203. The court found that the Auditor accepted the analysis of Dr. Haslag as factual. LF203. The court found the Auditor’s fiscal note “acknowledges” a negative impact on 510 lenders, but did not include any analysis of the impact in the fiscal note. LF204. The court found that Dr. Durkin’s testimony provided the fiscal impact on state revenues based on the proposed measure’s impact on 510 lenders. LF204. The court found that the Auditor admitted the fiscal note and summary did not include the impact on 510 lenders or on local government entities and the inclusion of such would increase the (negative) fiscal impact to the state. LF204. While the trial court states that many of these facts are “undisputed” such facts were still “contested” as described in *White*, and therefore this Court should defer to the trial court’s determination of such facts.

**C. The omission of impact on 510 lenders from the fiscal note and fiscal note
summary**

The State claims that the trial court erred in finding that there had been a complete omission of any fiscal impact on 510 lenders in the fiscal note and fiscal note summary because “there was evidence that the submission of [DIFP] reflected its analysis as to the effect on 510 lenders” and the DIFP response was included verbatim in the fiscal note. St. Br. at 43. Contrary to the State’s assertions, the record unequivocally supports the trial court’s finding.¹⁵

The State admits, in its brief, that the contents of Division of Finance estimate of fiscal impact were not included in the fiscal note. St. Br. 45. The State indicates that such estimates were not included in the official response from DIFP, the parent body of the Division of Finance, which was included verbatim in the fiscal note. *Id.* at 45. The State justifies this by pointing to Halwes’ testimony that the Division’s estimates were “incorporated” into the estimate of DIFP that there would “no cost or savings to the Department.” *Id.* at 45; TR89. Halwes testified that the following statement of DIFP includes the Division of Finance’s estimated \$675,000 loss:

¹⁵ The State also suggest the only “real issue” is whether the Fiscal Note is “adequate.”

Br. at 42. The State is wrong. The trial court specifically found the Fiscal Note and Fiscal Note Summary “unfair.” LF205. The Court found the Fiscal Note and Summary were likely to deceive voters in favor of the measure. LF205.

If the adoption of the measure results in a reduction of fee revenue from consumer credit entities, the department anticipates it would expend a correspondingly smaller amount to regulate these entities.

LF33; TR27-28, 89. According to Halwes, DIFP's response that there is "no cost or savings to the Department" means that the amount of fee revenue lost by business closures must equal the savings generated by decreasing regulatory staff. TR27-28, 89. While the State claims Plaintiffs failed to show that this conclusion was unreasonable, Plaintiffs showed that the conclusion was mere speculation by Halwes and was unsupportable based on calculations by Dr. Haslag.

Halwes testified he was only *speculating* as to whether the Division of Finance's estimated effect on 510 lenders was included in the DIFP estimate. TR28:12-14. He confessed that he was not sure and that he did not speak with the Division or Department or look at any documentation in an attempt to clarify what was included in the DIFP estimate. TR28:2-14.

The Division of Finance indicated that the closing of payday, title and some 510 lenders would result in a loss of \$675,000. Ex.3. They indicate an estimated savings to the Department on account of decreasing the consumer credit examination staff by 4 or 5 examiners. Ex.3. Dr. Haslag testified that even assuming the Division let go the five highest paid grade 3 examiners, it would only total \$487,500, and be nearly \$200,000 short of being a "wash" as suggested by Halwes. TR140-44. Basic math and the testimony

at trial show that the DIFP's response did not incorporate the impact on 510.

The State claims that Halwes concluded that the Division of Finance's comments were evaluated and modified by DIFP before they submitted their official response. The State claims this is a reasonable conclusion, and that Plaintiffs failed to show otherwise. To the contrary, the plain language of DIFP's response and basic math shows that the effect on 510 lenders was not included in the fiscal note or fiscal note summary.

D. The Auditor's duties in light of the *MML* cases

The State suggests that the only thing the Auditor failed to do was an "independent assessment" of 510 lenders and asserts that the Auditor is not required to do any independent assessment, citing *Mo. Municipal League*, 303 S.W.3d 573 (Mo.App.W.D. 2010) (*MML I*). The State also claims that the trial court misapplied the law since the court's finding would require an independent analysis by the Auditor. To the contrary – the trial court "acknowledge[d]" the Auditor's argument relating to the validity of the procedures used by the Auditor in preparing fiscal notes as upheld in *MML I*. The court correctly held:

[A]lthough the Auditor did comply with the general procedures approved in *MML*, this alone does not shield his work from being found insufficient.

LF205 n.1. The trial court correctly decided that voters and petition signers do have that right to demand accurate data and transparency. While the Auditor could have used any

number of procedures to "assess the fiscal impact of the proposed measure," in the end, he is still required to comply with §§116.175 and 116.190. Put another way, the Auditor's reliance on previously-approved procedures does not answer the question of whether, in this case, those procedures actually yielded an accurate, adequate, and fair result. In this case, the trial court found that the Fiscal Note and Fiscal Note Summary were insufficient and unfair based on the Auditor's omission of the fiscal impact the proposed measure would have on 510 lenders and local government authorities.

1. The limits of the Auditor's "discretion" under §116.175 after the *MML* cases

Current Missouri case law gives the Auditor substantial discretion in the method of preparing fiscal assessments under §116.175. These holdings do not answer the specific claims Plaintiffs have brought here because no Missouri case allows the Auditor to use this discretion in employing certain procedures to excuse substantive flaws in a given fiscal note or summary. In other words, the Auditor cannot avoid attack for actual mistakes and inaccuracies in the assessment merely because he followed an approved method in a given case.

The Auditor bases his defense in this case on his mere claim that he does not have to conduct an "independent assessment" based on an "approved" method. The Auditor invites the Court to ignore actual, palpable mistakes in the note and summary. Halwes demonstrated the absurdity of this position at trial. He stated that "no matter what the response" of the state and local government entities that he would include it verbatim in

the fiscal note. TR21:19-25. When asked if a submission stated that the proposed measure “will cause cats and dogs to sleep together” if he would include it, he indicated he would. TR22:1-4. When defending this irrelevant and blatant error, the Auditor would then hide behind the *MML* cases, arguing that he “followed the approved procedures” and is not required to conduct an “independent assessment.” No case has ever gone this far. To follow the Auditor down this path would be error. It would also remove the last conceivable restraint on the Auditor's conduct and render meaningless and unenforceable the requirements of “sufficiency” and “fairness” in §116.190. The trial court correctly looked to evidence to determine whether the fiscal note and summary were adequate, accurate, and fair.

2. Current statutory requirements

The Auditor “shall *assess* the fiscal impact of the proposed measure” §116.175. The term “assess” has a plain meaning: “to determine the rate or amount of.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, 131 (2002). “Determine” means “to fix conclusively or authoritatively.” *Id.* at 616. So the Auditor must fix conclusively or authoritatively the amount of fiscal impact of the proposed measure. That “assessment” cannot be “unfair” or “insufficient.” §116.190. The language the Auditor uses cannot be “argumentative” or “likely to create prejudice for or against the proposed measure.” §116.175.3.

MML I found that the Auditor's current method of preparing this assessment is

"adequate." *MML I*, 303 S.W.3d at 582.

3. Appellants misapply the *MML* cases

MML I and *MML II* do not hold that using the established process excuses actual inaccuracies and errors in the fiscal note or summary. Indeed, both decisions follow the same pattern. They first dispose of arguments the plaintiffs had made about procedural requirements the Auditor was supposed to follow. They then separately determine whether actual work product by the Auditor is inadequate or inaccurate. Neither case deals with the situation posed here: actual factual errors in the fiscal note and fiscal note summary.

The State's position misapplies the holdings of the *MML* cases as more fully detailed in Pt. II, *supra*. The *MML* cases held the Auditor need not adopt *another* method of independently assessing the costs or savings of the proposal. The Court did not hold that every time the court undertakes its "normal" process, its result must be deemed sufficient or fair.

Appellants point should be denied.

IV.

THE TRIAL COURT DID NOT ERR IN RULING THAT THE FISCAL NOTE AND FISCAL NOTE SUMMARY ARE INSUFFICIENT AND UNFAIR ON THE BASIS THAT PLAINTIFFS' EVIDENCE DID NOT SPECIFICALLY IDENTIFY LENDERS AFFECTED BY THE BALLOT INITIATIVE WHO WERE NOT ALREADY CONSIDERED IN THE FISCAL NOTE OR FISCAL NOTE SUMMARY.

(Responds to State's Brief Point V)

Appellants appear to argue that there was some type of confusion or ignorance of 510 lenders; however, the Auditor's representative was not confused as to what 510 lenders were, nor were other witnesses who testified, without objection. All of the witnesses further testified that the 510 lender impact was not calculated. Thus regardless of which specific types of 510 lenders were excluded from the fiscal note or fiscal note summary, the undisputed evidence makes clear that the proposed measure would impact at least some 510 lenders which would result in negative impacts to both the state and local governments. This Court should defer to the trial courts evidentiary determinations. The evidence shows that the fiscal note and fiscal note summary did not include any negative impact associated with the effects on 510 lenders and thus the fiscal note and fiscal note summary were insufficient and unfair, as the trial court properly held.

A. The Standard of Review is *de novo* for questions of law and *deference* to the trial court on contested issues of fact

The discussion of the Standard of Review for Point III is incorporated by reference here.

B. Evidence as to exclusion of 510 lenders

The evidence at trial showed that 510 lenders would be impacted by the proposed measure, that the Auditor relied on an analysis that did not include 510 lenders, that the fiscal note and fiscal note summary did not include any potential impact to 510 lenders, and that inclusion of the impact on 510 lenders would have increased the negative impact to state and local governments.

The State unexplainably claims that nothing in the record established that the judge, witnesses, and attorneys agreed on a common definition of “510” lenders. This is a red herring. The statute itself, §408.510 was offered at trial and the court took judicial notice of it. TR218-19; Ex.6. The plain language of the statute refers to “consumer installment lender[s].” §408.510. The record reflects that all parties involved understood the meaning of “510 lenders.”¹⁶

¹⁶ Halwes testified that he agreed “there are other lenders other than payday lenders and title lenders, known as 510 lenders.” TR35:21-25. He further testified that he understood 510 lenders are known as “installment lenders” and that “510 lenders” refers to lenders under §408.510, which labels the lenders as “consumer installment [lenders].” TR61:9-11, 17-24. The Auditor’s counsel referred to “510 lenders” as “510

The State claims that the trial court erred because (1) Plaintiffs' expert did not specify a type of 510 lender that would be affected by the proposed measure that was not included in the fiscal note, and (2) there was no testimony as to what percentage of 510 lenders do not also provide payday or title loans. These specifics are immaterial to the ultimate question of whether the fiscal note or fiscal note summary is insufficient. The record supports the following facts (1) 510 lenders would be affected by the proposed measure, (2) the Auditor relied on Haslag's analysis which did not include any potential impact to 510 lenders, (3) the Fiscal Note and Fiscal Note Summary did not include any impact on 510 lenders, and (4) the inclusion of the impact of 510 lenders would have increased the negative impact to state and local governments.

Mr. Halwes testified that the proposed measure would cause businesses to close. TR30:7-12. He also testified that in formulating the fiscal note, he relied on the analysis of Dr. Haslag. St. Br. at 43. TR32-33. The record shows that Dr. Haslag's estimates

installment companies." TR2:9-10. During the testimony of Dr. Haslag, "510 lenders" were referred to as "installment lenders." TR137:1-4. Dr. Haslag answered in the affirmative when asked directly by the Auditor's counsel "[D]o you know when I say that phrase, 510 company, what that is?". TR170:14-17. Dr. Durkin also answered in the affirmative when asked directly "Do you have an understanding of what 510 lenders are?" and confirmed that 510 lenders are also referred to as "installment lenders." TR178:25, 179:1-10.

included information on the effects of closures of payday and title lenders. TR35:15-20. The record shows that Dr. Haslag's estimates did not include any analysis based on the closure of 510 (installment) lenders. TR36:1-5; 61:2-4; TR131:4-14; 137:1-3. Mr. Halwes testified that the Fiscal Note and Fiscal Note Summary failed to contain any analysis as to the impact upon installment (510) lenders. TR61:25-62.

Dr. Haslag also testified that the Fiscal Note and Fiscal Note Summary failed to include any impact on 510 lenders. TR151:8-25. He indicated that if the fiscal impact from the 510 lenders had been included, it would increase the negative impact to both the state and local government entities. TR152:1-10. He confirmed these negative impacts were not reflected in either the Fiscal Note or Fiscal Note Summary as prepared by the Auditor. TR153: 1-11. Dr. Durkin concurred with Mr. Halwes and Dr. Haslag, testifying that neither the Fiscal Note nor the Fiscal Note Summary included the proposed measure's impact of 510 lenders and the resulting negative impact on state or local government entities. TR204:8-16.

The Auditor attempts to save the Fiscal Note and Fiscal Note Summary by pointing out that Halwes testified the submission of DIFP does reflect its analysis as to the effect on 510 lenders. This is a mischaracterization. Halwes testified he was only *speculating* as to whether the Division of Finance's estimated effect on 510 lenders was included in the DIFP estimate and confessed that he was not sure and that he did not speak with the Division or Department or look at any documentation in an attempt to clarify what was

included in the DIFP estimate. TR28:2-14. The Division of Finance suggested a significant loss in revenue as a result of 510 (and other) lenders going out of business. LF44.

Dr. Durkin testified that the 510 industry would shut down as a result of the proposed measure.¹⁷ Exh.14. The loss of these consumer installment loans, would result in the following fiscal impacts (1) reduce state sales tax revenues in year 1 and 2 by \$5.44 million, (2) reduce income tax revenues by \$1.2 million in year 1, (3) reduce state sales tax revenues from former employees due to belt tightening by \$.845 million, (4) increase unemployment compensation by \$6.6 million, and (5) reduce business income tax revenues by \$.504 million. Ex.14, TR189-97. As a result of the proposed measure's impact on 510 lenders, the total negative impact in year 1 would be \$14.589 million and

¹⁷The Auditor also attempts to disparage the testimony of Dr. Durkin, labeling it "indefinite and inconclusive," by taking it out of context. While Dr. Durkin suggested that he did not "spen[d] a lot of time" looking specifically at Section 408.510, this response related to the issue of whether he understood the term "510 lenders." When asked, he affirmed that he was familiar with the terminology and proceeded to explain and define his understanding of 510 lenders. TR178:25-179. While Dr. Durkin did state he accepted another individual's estimate on how many employees are in the 510 industry, the estimate he said was from a Missouri lawyer at a professional convention, Dr. Durkin testified that the exact number would be difficult to verify, but that based on his review of other materials the estimate was reasonable. TR192:10-19. Finally, the fact that exact "distribution of companies" was not established by the testimony of Dr. Durkin, or anyone else, is immaterial.

in year 2, \$5.944 million. Ex.14, TR189-97. None of this was included in the Fiscal Note or Fiscal Note Summary.

The undisputed evidence makes clear that the proposed measure would impact at least some 510 lenders which would result in negative impacts to both the state and local governments. The evidence shows that the Fiscal Note and Fiscal Note Summary did not include any negative impact associated with the effects on 510 lenders. The trial court found that this failure caused the Fiscal Note and Summary to be insufficient and unfair and that decision should be affirmed.

V.

THERE ARE NUMEROUS ALTERNATIVE GROUNDS UPON WHICH THIS COURT SHOULD AFFIRM THE TRIAL COURT'S FINDING THAT THE FISCAL NOTE AND FISCAL NOTE SUMMARY ARE INSUFFICIENT AND UNFAIR.

The trial court's decision should be affirmed on the grounds as described above; in addition, the trial court's decision can be affirmed any one of the following alternative grounds: that the fiscal note and fiscal note summary (1) failed to state an amount for local government losses when such amount was certain; (2) failed to include costs related to unemployment insurance; (3) failed to include costs related to loss of local tax revenue; and (4) fail on basic math. As this court has explained:

This Court is primarily concerned with the correctness of the result, not the route taken by the trial court to reach it; the trial court's judgment will be affirmed if it is correct on any ground supported by the record, regardless of whether the trial court relied on that ground.

Missouri Soybean Ass'n v. Missouri Clean Water Com'n, 102 S.W.3d 10, 22 (Mo. banc 2003). The following grounds for affirmance are supported by the record.

A. The Fiscal Note Summary falsely states that local government losses "could" not occur or are uncertain

Mr. Halwes admitted-and both experts agreed-that local government losses were certain to occur. TR68-69, 147-48, 198-200. On the issue of direct losses, the only variable was the amount of fee license income paid by lenders who would close their doors under the direct cap. Dr. Durkin testified that other losses, such as lost revenues from local sales and earning taxes, for example, would occur. TR199-200. Dr. Haslag testified that local political subdivisions would have losses of at least \$122,000 based on a sampling of two cities that would lose license fee revenue. TR147. On broader measures of revenue, he noted that he had calculated only state-level losses based on business closures, even though the same effects would lead to losses for revenue-collecting local political subdivisions. TR152. Even after receiving obviously incomplete or inconsistent responses from cities, some of which indicated that there would be no fiscal impact from the closure of businesses, Mr. Halwes admitted that he did nothing to follow up with or obtain clarification from even one local political subdivision. TR73-74.

Against this evidentiary background, the Auditor summarized the local impact as follows: "Local governmental entities could have unknown total lost revenue related to business license or other business operating fees if the proposal results in business closures." Ex.3.

This statement is flawed. First, the statement avers that cities "could" lose license

revenue "if" there were business closures. But Mr. Halwes admitted that closures "would" occur. TR30. In fact, the first part of the Fiscal Note Summary is entirely based upon this assumption. Mr. Halwes knew from Dr. Haslag that at least some cities did charge license fees, and that those fees would be lost when stores closed. The only question was how many cities charged these fees and the amounts they charged. Thus, the Fiscal Note Summary falsely suggests that there is something contingent about local license fee losses, when in fact, the undisputed facts showed-both at trial and back when the note was being drafted-that they are certain.

Second, Mr. Halwes refused to include the data he did receive. Losses of at least \$122,000 were certain, and that was based on Dr. Haslag's information from only two cities. The omission of this certain result makes the inevitable resulting closures and resulting losses appear somehow uncertain. It is undisputed that such closures are certain. Thus the Fiscal Note and Fiscal Note Summary are insufficient and unfair.

B. The Fiscal Note Summary excludes costs related to unemployment insurance

Although the Auditor admitted every portion of Dr. Haslag's unemployment insurance analysis, his summary fails to even mention the substantial anticipated payouts because of his view that the unemployment compensation fund is not general revenue of the state. TR45-48. However, the Comprehensive Annual Financial Report of the State of Missouri shows that the fund is a state fund. Ex.5, pp. 21-23. Mr. Halwes ultimately provided no reason or authority for his view that a fund that is replenished by direct taxes

on employers, and which admittedly would have to charge employers higher rates to recover for job losses anticipated under the initiative, does not include at least one facet of a fiscal impact. In contrast, Plaintiffs' experts, Dr. Haslag and Dr. Durkin, both testified that the taxing of employers into a special fund is a fiscal activity, and that outlays from that fund that will require higher taxes should be included in a fiscal impact statement. TR130-35, 190-95.

Further, Dr. Haslag testified that even if the Auditor refused to consider actual outlays by the fund, taxes to cover those outlays would themselves cause direct fiscal impacts. Increased payments into the fund to cover increased jobless benefits would lower corporate income-and, therefore, would lower tax collections for the purposes of general revenue-by a fixed amount and Missouri's unemployment compensation fund has had to borrow hundreds of millions of dollars from the federal government to cover excess payments. TR133-35. The State will have to finance additional obligations by paying interest, which Dr. Haslag believed could be paid from general revenue. *Id.*

Because he agreed that outlays of \$8 million or \$10 million would definitely have to be made from the unemployment fund (even without accounting for "510" lender closings), the Auditor should have somehow reflected this impact in his Fiscal Note Summary. The most accurate and fair result would have been to simply include this amount in lost revenues (or costs) to the state.

Regardless of the precise manner in which the "unemployment compensation" analysis in the Fiscal Note was reflected in the Summary, it should not have been completely omitted. Once again, the Auditor erred by understating the fiscal impact of the initiative as shown in the Fiscal Note.

C. The Fiscal Note and Fiscal Note Summary exclude the loss of local revenue

The first half of the Fiscal Note Summary is based on statewide taxes and state revenue, but the bottom half of the Summary ignores the existence of parallel taxes at the local level. As Dr. Durkin noted, those can be significant. TR200. Halwes admitted that it was "clear" from Dr. Haslag's report that there would be a "local impact" TR90.¹⁸ Dr. Haslag testified that there would be lost local license fee revenue. TR147. Halwes admitted there would be state income tax loss, and that he was aware of similar local level income (earnings taxes) but did not include this in the Fiscal Note or Fiscal Note Summary. TR53-54, 73, 86.

It is undisputed that the proposed measure would cause lost state sales tax revenue. Dr. Durkin testified there would be parallel losses in local sales tax revenue as a result of the proposed measure. TR199-200. This testimony was confirmed by Halwes, who stated there would be a "corresponding impact for local government sales tax revenue." TR69:3-7.

¹⁸ Indeed, the trial court noted, in its Judgment, that the Auditor admitted the Fiscal Note and Fiscal Note Summary contained no analysis of "local impact." LF204-05.

Because the fact of closures and the fact of tax losses at all levels is not in dispute, the Fiscal Note Summary should at least have included reference to local lost revenues other than license fees.

D. The Fiscal Note Summary fails on simple math

Another serious flaw in the Fiscal Note Summary is one of simple math, and it arises purely on the undisputed facts. The Fiscal Note Summary states that state agencies "could have annual lost revenue estimated at \$2.5 million to \$3.5 million that could be partially offset by expenditure reductions for monitoring industry compliance." LF45. All of the witnesses agreed that the relevant facts in the Fiscal Note are in Table B of Dr. Haslag's analysis. TR30-31, 195. Table B calculates state losses assuming that all title and payday stores close, an assumption which all the witnesses independently investigated and, ultimately, adopted. *See* Exs.3 and 7.

The problem is that even if "expenditure reductions for monitoring industry compliance" are able to completely offset state license fee revenue losses, Table B clearly shows that the lowest possible amount of "annual lost revenue" is approximately \$3 million. Ex.7, Table B. The Fiscal Note Summary falsely suggests that lost revenue could start as low as \$2.5 million, and even then could be offset by cost reductions. Assuming that all payday and title stores close-an assumption with which there was no disagreement by Halwes (TR30-31), and for which there was no contradictory evidence, this simply cannot be correct.

The trial court's judgment should be affirmed.

VI.

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE SECRETARY'S SUMMARY STATEMENT IS "INSUFFICIENT, UNFAIR AND LIKELY TO DECEIVE VOTERS" OR IN HOLDING THAT THE SUMMARY STATEMENT IS "INSUFFICIENT AND INADEQUATE" BECAUSE THE SUMMARY STATEMENT FAILS TO SUMMARIZE THE MATERIAL POINTS OF THE INITIATIVE PETITION.

(Responds to State's Brief Point I and MRL's Brief Point I)

The legislature has imposed upon the Secretary of State an affirmative duty to provide a summary of initiative petitions. Her duty is to "promote an informed understanding by the people of the probable effects" of the initiative. *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 11 (Mo. banc 1981). The statute codifies this duty by requiring a 100 word or less "summary" of the initiative (§113.334) and by allowing the Courts to review the summary to see if it is either "insufficient" or "unfair." §116.190. Contrary to the position of the Appellants, the Secretary's duties require more than simple "notice" of what might be in an initiative and the Court's review is not limited to whether the language used is argumentative. Instead, the Secretary has an affirmative duty to provide an accurate and sufficient summary of the measure. In this case, the trial court correctly found that she did not.

**A. Standard of review is *de novo* for questions of law and deference to the trial court
on contested issues of fact**

The discussion of the Statement of Review for Point III is incorporated by reference herein.

**B. The legislature has provided important procedural safeguards to prevent abuse of
the initiative petition process**

Chapter 116 specifies procedures for the placing of an initiative petition on the ballot. This Court has long recognized that procedural safeguards, both those in the Constitution and those created by the legislature -- are important and necessary in the initiative petition process for two reasons "(1) to promote an informed understanding by the people of the probable effects of the proposed amendment; or (2) to prevent a self-serving faction from imposing its will upon the people without their full realization of the effects." *Buchanan*, 615 S.W.2d at 11. See also *Knight v. Carnahan*, 282 S.W.3d 9, 16-17 (Mo.App. 2009), holding that whether "statutory requirements for a validly enacted law [were] followed" is such an important issue that it may be reviewed even though the measure had already been adopted by a vote of the people. Two of those important legislative safeguards are the requirement that the Secretary of State provide a summary of the proposed initiatives and that the Courts review that summary statement. §§116.334 and 116.190.

In considering these safeguards, the courts balance the interests of proponents of the initiative (Intervenors here) in placing their desired law change on the ballot against the rights of the opponents in seeing that the change is not on the ballot unless the citizens make an informed decision to place it there. *Buchanan*, 615 S.W.2d at 11. Intervenors urge this court to place a foot on the scales that balance those interests and abandon the procedural safeguards in favor of a wide and smooth road straight to a vote of the people regardless of whether those signing the initiative have a full understanding of its effects. *See Shull's Brief* at 35. MRL not so subtly urges this court to apply an added standard to review of the statutes and consider the effect it might have on their efforts.¹⁹ MRL Br. at 60. Although they have not themselves challenged the role of the Secretary of State or the Auditor in the initiative process, they claim they "relied on" the state officials and that affirming the trial court would "frustrate constitutional objectives." MRL Br. at 59. To amend the law by initiative petition, "proponent must comply with the amending process prescribed in our Constitution and laws. It is not enough to say that the people have the

¹⁹ Intervenors insert non-record information into their brief. Bryan inserts specific allegations about the number of signatures that have been submitted to the Secretary of State and even the allegation that "clergy" were used to gather the signatures. MRL Br. at 60. None of this is in the record below and it is not proper argument to this Court because it has absolutely nothing to do with the plain language of the statutes, the evidence below or the standard of review.

right" to change the law by initiative. *Buchanan*, 615. S.W.2d at 18 (Rendlen, J., dissenting). The Court should ignore the histrionics of Intervenor and reject any back door argument that the statute governing her involvement is unconstitutional. No one has challenged the procedural safeguards of §§116.334 and 116.190. The sole issue is how to interpret them and apply them in this case. At the end of the day, the analysis of these statutes is no different than any other analysis the Court performs.

1. The Secretary has an obligation to summarize the initiative petition

In order to pass laws by the initiative, the Constitution requires the proponents to obtain a certain number of signatures and to submit those to the Secretary. Mo. Const. art. III, §50. The legislatively enacted procedure for submitting those signatures requires the proponents to submit signature pages in a certain form that must be approved by the Secretary in advance of circulation. §116.180. In addition, the Secretary must review the initiative petition and summarize it. §116.334. The legislature thought this summary was so important in the process that the summary must be placed on each signature page and signatures will not be counted unless the Secretary's summary is on each page in the mandated location. §116.120.

Because of these statutes, anyone considering whether to sign an initiative petition will see the official ballot title, consisting of the Secretary's short summary of the initiative together with a fiscal impact summary provided by the Auditor. This information is printed on the initiative signature page directly above the place where

citizens may sign so that they can read about the initiative before they sign. The "official ballot title" which includes the secretary's summary statement and the auditor's fiscal note summary are offered to the voter as an explanation of the effect of the underlying petition. The importance of this summary is self-evident: it is to give the citizens a quick and impartial way to make decisions about whether they want the measure on the ballot. If the Secretary or the Auditor fail in their required duties, those considering whether to sign the initiative do so with incorrect or improper information. In this case, the trial court found that those seeking to sign the initiative would be misled by the official ballot title.

2. Citizens have the right to petition the courts for review of the Secretary's summary statement

In addition to the summary requirement, the Legislature has established another safeguard – judicial review. When the Secretary prepares her portion of the official ballot title, the legislature has mandated that her statement be 100 words or less and that the manner of summarizing shall be using language that is not "argumentative" or "likely to create prejudice for or against the proposed measure." §116.334. The statutory scheme allows the Secretary's summary statement to be reviewed by the courts upon petition of "any citizen who wishes to challenge" the statement regardless of whether they support or oppose the initiative. §116.190. The court reviews the summary to determine if it is "insufficient or unfair." *Id.* Allowing citizens to challenge the summary statement is an important protection to make sure those opposed to the measure have a sufficient

opportunity to challenge the summary that petition signers will see. *Overfelt v. McCaskill*, 81 S.W.3d 732, n.3 (Mo. App. 2002). Of course, it would also allow proponents of an initiative to obtain a fair and sufficient statement if they believe the Secretary or Auditor have failed in their duty.

C. The sufficiency and fairness requirement in section 116.190

Words in a statute are, of course, interpreted using their plain and ordinary meaning. *Utility Serv. Co., Inc. v. Dept. of Labor and Indus. Relations*, 331 S.W.3d 654, 658 (Mo. banc 2011). A "summary" statement must be a "short restatement of the main points." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2289 (2002). A thing is "insufficient" if it is "inadequate to some designated need or purpose." *Id.* at 1172. Since a summary is to "restate the main points," a summary statement is insufficient if it does not adequately restate the main points of the initiative. The Court of Appeals has used a slightly different, but totally consistent definition of insufficient: "Insufficient means 'inadequate; especially lacking adequate power, capacity, or competence.'" *Missourians Against Human Cloning*, 190 S.W.3d 451, 456 (Mo.App. 2006) (quoting *Hancock v. Secretary of State*, 885 S.W.2d 42, 49 (Mo.App. 1994)). This plain language approach to the statute is exactly the approach used by the trial court.

A close review of the statutory language makes clear that the Secretary's obligation in preparing her summary statement is two-fold. §116.334. First, the Secretary must provide a summary. *Id.* In addition, this summary must be in language that is neutral. *Id.*

The two-part analysis is clearly reflected in §116.190's discussion of the factors the court should consider when a challenge has been brought. A challenge may be brought if any citizen considers the statement "insufficient" *or* "unfair." §116.190. A plain meaning of the statute leads to the conclusion that either insufficiency or unfairness, or both, justify granting a plaintiff's request for a different ballot title. A summary could be invalid if it is insufficient (although it might use words that are not argumentative and unfair) but it could also be re-written because it is sufficient, but uses words that are unfair and argumentative.

Although the plain language of the statute provides the legal standard necessary to analyze the issue in this Point, case law is consistent with the plain language analysis outlined above. The State's brief misstates the standard because it relies on imprecise, often introductory language in Court of Appeal's decisions. Specifically, the state relies on language which changes the "or" separating "insufficient" from "unfair" to an "and." See *Hancock v. Sec. of State*, 885 S.W.2d 42, 49 (Mo.App. 1994) quoted on page 22 of the State's Brief. But a more thorough review of appellate jurisprudence makes clear that Missouri Courts have consistently followed the language of the statute which requires that the summary statement be *both* sufficient *and* fair. Appellants do not seriously contest that the test is for both sufficiency and fairness. Indeed, the state draws the distinction in its brief, arguing "there is no bias, prejudice, deception and/or favoritism in the

Secretary's language *and* the language makes the subject evident with sufficient clearness." St. Br. at 26 (internal quotes omitted).

This two part analysis is the correct standard. The Court of Appeals has acknowledged that the Secretary performs no great feat when she simply fails to deceive the voters. Instead, the statutes place an additional obligation on her: "[i]t is incumbent upon the Secretary in the initiative process to promote an informed understanding of the probable effect of the proposed amendment." *Cures without Cloning v. Pund*, 259 S.W.3d 76, 82 (Mo.App.W.D. 2008). This obligation is found in the simple meaning of the word "summary" as discussed above. Similarly the Court of Appeals has written that accuracy alone is not the full test, rather the summary must "accurately reflect[] *the legal and probable effects of the initiative*." *Mo. Municipal League v. Carnahan*, 303 S.W.3d 573, 584 (Mo.App.W.D. 2010)("*MML I*"). This type of language reflects the mandate of *Buchanan* that procedural safeguards such as §§116.334 and 116.190 must promote an informed understanding of the initiative. To be sufficient, the summary must indeed have "adequate power, capacity, [and] competence." *Missourians Against Human Cloning*, 190 S.W.3d at 456.

Prior case law does not address the specific situation the Court faces here – failure to adequately, with power and capacity, summarize the main points of the initiative. Certainly cases have held that the Secretary need not elaborate on every detail of an initiative. *Id.* The statutes do not require great specificity, but they do require an adequate

summary. Since there is no dispute that a summary must include the main points, the first issue is whether the summary adequately and with sufficient power contains the main points of the initiative.

D. The trial court found the Summary to be Insufficient as a matter "of law and fact"

The trial court found that the "very meaning and purpose" of the initiative was the 36% interest limit. As a matter of "law and fact" the effect of the initiative is "not tied to the mere *existence* of a 'limit' but rather, it depends on *what* the 'limit' is." The trial court reached this decision after considering evidence of the language of the initiative itself, testimony from expert witnesses and from the Auditor's office about what the effect of the initiative would be.

1. There was ample support for the finding of insufficiency

The Court's finding of insufficiency due to the Secretary's failure to advise voters the interest rate would be changed to 36% was well supported by the evidence. The initiative itself declares the 36% limit to be the purpose of the initiative. Section 408.100 of the initiative advises "it is the intent" of the initiative to "reduce the annual percentage rate for payday, title installment and other high cost consumer credit and small loans from triple digit interest rates to thirty six percent per year." Ex.1; LF26. The initiative claims that rates without the new law are "as high as three hundred percent annually" prior to imposing the thirty six percent limit, making clear that a reduction to a set amount is the

goal and that the effect of the initiative is to lower the rate to a set amount. *Id.* The proponent and submitter of the initiative to the Secretary summarized his own initiative identifying the important points of the initiative, the first of which was that it would "reduce" the interest rate "to 36%." LF165.

Dr. Joseph Haslag, testified at trial and told the Court that without knowing the interest rate, there would be no way to analyze what effect the initiative would have on costs or savings to the State. TR154. The Auditor's office agreed by way of testimony from the official who prepared the fiscal note and fiscal note summary.

The fiscal note summary prepared by the Auditor depended on the interest rate being 36% as opposed to some other number. TR34-35. The trial court had the benefit of hearing testimony about the real impact of the initiative when it concluded "as a matter of both law and fact" that the "probable effect" of the initiative depends on "what the 'limit' is." LF202. Defendants offered no evidence that would support a finding to the contrary. The trial court's factual determination should not be disturbed unless it is against the weight of the evidence or there is not substantial evidence to support it. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976). In this case, all of the evidence supports the trial court finding that the main point of the initiative was the reduction to 36%.

Of course the trial court was right that the interest rate is a critical factor in deciding whether this initiative should be placed on the ballot. When one is asked to agree to an interest rate, the most important factor is what the rate is. The trial court pointed out

this logic by briefly referencing state and federal statutes as well as the common law's treatment of interest as a material term in any contract. LF202. This language appears to be the trial court's way of elaborating upon his own factual finding, but it takes no more than common sense to find that a person considering whether to sign an initiative to place an interest rate cap on the ballot would want to know the actual rate. Knowing that the cap is 36% is a critical piece of information which is material and undoubtedly a "main point" of the initiative. The trial court's reference to the common law is particularly insightful. In essence, the Secretary of State has omitted a material term from the summary statement such that there cannot be a meeting of the minds without knowing what the interest rate is. *See Wigley v. Capital Bank of Southwest Mo.*, 887 S.W.2d 715, 724 (Mo.App. 1994).

2. The Trial Court found the Summary to be unfair

For this reason, the court also found that "without an explicit statement of the limit, the Summary is misleading and likely to deceive petition signers and voters." The phrase "unfair" in §116.190 must also be interpreted using the plain and ordinary meaning as found in the dictionary. If the Summary is "unfair" it is guilty of "providing an insufficient *or* inequitable basis for judgment or evaluation." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2495 (2002) (emphasis added). Prior jurisprudence acknowledges that a summary statement which is insufficient is also unfair within the plain meaning of those terms. The Court of Appeals has upheld the re-writing of a

summary statement, without discussing whether the language was argumentative and likely to create prejudice, finding that a summary was insufficient and unfair because it "does not fairly summarize any goal or effect of the initiative proposal." *Cures*, 259 S.W.3d at 82.

The *Cures* holding is consistent with the ordinary meaning of the words in the statute – failing to summarize makes the summary both insufficient *and* unfair. A summary of an initiative to change the eminent domain laws required Court intervention and a new summary statement because the summary must "accurately reflect[] the legal and probable effects of the initiative." *Mo. Municipal League*, 303 S.W.3d at 584. "To be fair and impartial, the summary should describe [the] changes" made by the initiative. *Id.* at 586.

E. Notice is not the standard

Ignoring the language of the statute, the State's brief takes the position that the summary statement must only give notice of the subject of the law. St. Br. at 25. MRL's brief elaborates on this concept by urging this court to look to clear title cases for guidance. MRL Br. at 49-50. MRL further claims it is sufficient for the Secretary to give notice and then to have "individuals . . . look to the proposed law itself for greater detail about the proposed law's precise provisions." MRL Br. at 49. This "notice" standard cannot be found in the statutes or in any reasonable interpretation of the words used. Had the legislature meant the Secretary to give "notice," the statute could use that phrase.

Instead the statute requires a summary of the measure in up to one hundred words. This Court's holding in *Buchanan* points out that the point of such a safeguard is to promote an informed understanding of the initiative and its probable effects, not simply to give notice and hope citizens can figure it out.

MRL, consistent with its position as a partisan proponent of the initiative, urges the Court to ignore the statutes and look instead to clear title cases for a lower bar. MRL Br. at 49. The clear title cases interpret a constitutional provision, not the statutes at issue here. MRL borrows from those cases and asks that the Secretary's one hundred word summary statement only be required to "indicate in a general way" the type of initiative enacted. *Id.* MRL goes on to say that "an official ballot title has never been intended to serve as the key source of information for citizens" concerning the initiative. MRL Br. at 55. MRL cites to no statutory or case law as authority for this proposition, because there is none. Instead, the statutory requirement that the Secretary summarize the initiative, that the Auditor comment on its fiscal impact and that this information be placed on each and every signature page in a prominent place where signers will review it leads to the opposite conclusion. The official ballot title is not only *intended* to be an important source of information, but as a practical matter it is.

MRL goes on to analogize their proposed "notice" standard to that of candidate elections. MRL says that candidates are listed on the ballot solely by name and by party and citizens must inform themselves if they want to know more. MRL Br. at 55. Of

course, the statutes do require the Secretary of State to provide more about the candidate, such as an address and the party to which she belongs. §115.401. Allowing the Secretary to ignore the statutory requirement that she summarize an initiative petition would be no different than allowing her to print a list of candidates without party identification or, more analogous to this case, allowing her to print only part of the name of a candidate, i.e. listing "Mr. Kinder" as a candidate for Lt. Governor without telling voters whether the candidate is Byron Kinder or Peter Kinder.

No doubt there are Court of Appeals cases that mention the "notice" concept in the initiative petition summary statement context, notably *Bergman v. Mills*, 988 S.W.2d 84, 92 (Mo.App.W.D. 1999). But these cases, and Appellant's briefs, all trace back to this Court's decisions in *Union Electric v. Kirkpatrick*, 678 S.W.2d 402 (Mo. banc 1984) and *Union Electric v. Kirkpatrick*, 606 S.W.2d 658 (Mo. banc 1980). The *Union Electric* cases were not challenges to the procedural requirements of the legislature, but rather challenges to the Constitutional requirements concerning a single subject being expressed in a title. Those cases pre-date these statutes and analyze a completely different standard, nevertheless they continue to be cited. *See St. Br. at 24*. The legislature did not direct the Secretary to simply provide notice of the subject of the initiative and direct the voters to the initiative itself. Rather the language of the statute is more specific and requires a summary that is both sufficient and fair.

VII.

THE TRIAL COURT DID NOT ERR IN CERTIFYING THE COURT-WRITTEN SUMMARY STATEMENT PORTION OF THE OFFICIAL BALLOT TITLE TO THE SECRETARY OF STATE IN THAT THIS IS THE ONLY ACTION THE TRIAL COURT IS AUTHORIZED TO DO BY SECTION 116.190 WHEN A SUMMARY STATEMENT IS DETERMINED BY THE TRIAL COURT TO BE INSUFFICIENT OR UNFAIR.

(Responds to State's Brief Point II)

A. Standard of Review

Issues regarding the constitutional validity and construction of state statutes are reviewed *de novo* by this Court. *School Dist. of Kansas City v. State*, 317 S.W.3d 599, 604 (Mo. banc 2010).

B. Separation of powers

Article II, section 1 of the Missouri Constitution provides:

The powers of government shall be divided into three distinct departments--the legislative, executive and judicial--each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall

exercise any power properly belonging to either of the others,
except in the instances in this constitution expressly directed
or permitted.

"This language seems restrictive but in practical application has always been liberally construed. The word 'properly' is taken as meaning solely or exclusively." *Clark v. Austin*, 101 S.W.2d 977, 987 (Mo. banc 1937). "In practice, the functional lines between . . . political departments are not hard, impenetrable ones. There is a necessary overlap between the functions of the departments of government." *State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228, 231 (Mo. banc 1997). Violation of separation of powers can occur in two ways: (1) when one branch interferes impermissibly with the other's performance of its *constitutionally assigned power*; or (2) when one branch assumes a power that more properly is entrusted to another. *Id.*

Neither of these types of violation has occurred in this case.²⁰ The authority to write a summary statement is not a duty imposed on the Secretary by the Constitution, so no violation can occur under the first type. Nor has there been a violation under the second type because the judiciary is only rewriting that portion of the summary statement

²⁰ The State does state in its Brief that there are two types of violation and do not state which one they assert is applicable. St. Br., pp. 27-35. It leaves Francis no choice but to brief this Court generally as to the two types and then to address both possibilities.

that was in excess of any discretionary authority granted to the Secretary by statute. This Court must deny the State's Point II.

C. The Secretary's authority to write summary statements for initiative petitions is not assigned by the Constitution

The Secretary seems to suggest that her authority to write summary statements is found in the Constitution, yet she cites no provision imposing that duty upon her.²¹ This is because no such provision exists. In fact, the Secretary is mentioned only twice in the various constitutional provisions relating to initiative petitions. Article III, section 50 states that initiative petitions proposing amendments to the constitution or proposing laws must be filed with the Secretary not less than six months before the election. This section does not even state what the Secretary does once such petitions are filed with her. The only other provision mentioning the Secretary is Article III, section 53, which states:

The total vote for governor at the general election last preceding the filing of any initiative or referendum petition shall be used to determine the number of legal voters necessary to sign the petition. In submitting the same

²¹ State's Br., pp. 27-35. The Secretary includes in her list of constitutional provisions article XII, section 2(b), a provision that not only fails to mention the Secretary, but also only applies to amendments to the constitution. St. Br., p. 29. This case is about an initiative petition to enact/amend *statutes*.

to the people the secretary of state and all other officers shall be governed by general laws.

This provision implies that the Secretary has some role in submitting initiative petitions to the voters, but that is governed by statutes. Even turning to article IV, section 14:

The secretary of state shall be custodian of the seal of the state, and authenticate therewith all official acts of the governor except the approval of laws. . . . [The Secretary] shall keep a register of the official acts of the governor, attest them when necessary, and when required shall lay copies thereof, and of all papers relative thereto, before either house of the general assembly. [The Secretary] shall be custodian of such records, and documents and perform such duties in relation thereto, *and in relation to elections and corporations, as provided by law*, but no duty shall be imposed on him by law which is not related to his duties as prescribed in this constitution.

(emphasis added). Contrary to the Secretary's assertion in her brief that this provision makes her "chief elections officer of the state," St. Br., p. 33, the Secretary's authority as to elections is "as provided by law." This provision allows the legislature to impose duties

upon her related to elections. This provision does not, however, give her any duties regarding the preparation of summary statements for initiative petitions. That simply is not in the language. The first type of separation of powers violation simply cannot exist as regards a court's rewriting of the summary statement because the duty is not assigned to the Secretary by the Constitution.

D. The authority for the Secretary to prepare summary statements for initiative petitions is granted by statute

Section 1 of §116.334.1 states in pertinent part:

If the petition form is approved, the secretary of state shall within ten days prepare and transmit to the attorney general a summary statement of the measure which shall be a concise statement not exceeding one hundred words. This statement shall be in the form of a question using language neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure.

No one in this case disputes that the Secretary's summary statement must also be neither "insufficient nor unfair." §116.190. As such, the power that she has been given by the legislature is to write a summary statement that is not intentionally argumentative, not prejudicial, not insufficient and not unfair. As long as the Secretary exercises any discretion given to her in exercising this power within these parameters, there is no other

branch of government that interferes. It is only when she has been determined by a court to have exceeded her power,²² by writing a summary statement that is, as in this case, insufficient and unfair, that the legislature has authorized the judiciary to rewrite the summary statement.

E. The limitations on the trial court's authority to "rewrite" the summary statement as set forth in Court of Appeals cases remedies any possible encroachment upon the Secretary's power

If anything in §116.190 can be interpreted to possibly encroach upon the Secretary's powers (assuming, for argument, that they are vested solely in her), it might be if the trial court completely rewrote the entire summary statement after finding it insufficient or unfair – if it went beyond correcting the summary statement and chose its own wording even where the Secretary had used sufficient and fair language. To the extent this may be a violation of separation of powers, the Court of Appeals has already remedied such a problem through its rulings.

Cures without Cloning v. Pund, 259 S.W.3d 76 (Mo. App. 2008) acknowledges the Secretary's role and protects that role by making it abundantly clear that a trial court does not have the authority to completely rewrite a summary statement; it can only modify the original summary statement to the extent necessary to correct the verbiage that makes it

²² In her brief, the Secretary does not dispute that a court can make this determination. St. Br., pp. 27-34.

insufficient or unfair. *Id.* at 83. *MML* also stayed within these parameters, rewriting the summary statements only to correct the insufficiency or unfairness and going no further. As such, the Court of Appeals has interpreted the trial court's authority in §116.190 to be limited to rewriting the portion of the summary statement where the Secretary was determined to have exceeded her authority and thus any discretion that may be placed with her. Such an interpretation is consistent with the statutory language while also protecting the discretion of the Secretary – so long as she exercises it properly.

The statutes do not give the Secretary the discretion to write an insufficient or unfair summary statement. She would exceed her authority in doing so and any discretion she is given is limited to the parameters of writing a summary statement that is not insufficient, unfair, or prejudicial. A court in no way invades any discretion placed in her when it corrects verbiage that exceeds the authority she is given. As such, the complaint lodged by the Secretary, to the extent it has any merit, has already been remedied by the ruling in *Cures* that has been followed since, and is followed by the trial court. The Secretary's Point II must be denied.

VIII.

THE TRIAL COURT'S JUDGMENT PROTECTS THE INITIATIVE PROCESS AND BURDENS NO CONSTITUTIONAL RIGHTS.

(Responds to MRL's Brief Point II.E)

Almost as an afterthought, MRL claims that the trial court's judgment cannot stand because it "burdens" their constitutional right to engage in the petition process. MRL Br. 59-60. This claim is meritless, but this Court need not (and should not) reach the merits because it is unripe: the validity of signatures gathered by MRL is not at issue in this case, and will not be at issue until the Secretary of State certifies the number of valid signatures on the petition.

A lawsuit under §116.190, merely decides whether the summary statement, fiscal note, and fiscal note summary are "sufficient" and "fair." If they are not, the trial court either certifies a new, corrected summary statement, or remands the fiscal note and fiscal note summary to the Auditor for a second try. §116.190.4. There is no ruling on the validity of signatures, as all parties and the trial court acknowledged in the Second Amended Judgment: "The Court recognizes that those portions of Plaintiffs' prayers for relief seeking invalidation of signatures were withdrawn and were not tried." LF206.

In §116.200 the General Assembly has provided a separate statutory proceeding for the type of issue MRL has belatedly raised, the validity of their signatures. But first, the Secretary has several tasks to complete. Under §116.120 after a petition is submitted,

the Secretary of State is to “examine the petition to determine whether it complies with the Constitution of Missouri and with this chapter.” §116.120.1. Among other things, the Secretary has authority not to count signatures “which are, in his opinion, forged or fraudulent signatures.” §116.140. The Secretary then issues a “certificate of sufficiency” or, if it is insufficient, “shall issue a certificate stating the reason for the insufficiency.” §116.150. The Secretary must issue the appropriate certificate no later than the thirteenth Tuesday before the general election. §116.150.3. The §116.200, challenge to the Secretary’s “sufficiency” determination can be filed by “any citizen” in the Cole County Circuit Court “within ten days after certification is made,” and the challenge must be decided “as quickly as possible.” §116.200.2.

Therefore, if any decision regarding the official ballot title will injure MRL, several contingencies must occur. First, MRL must turn out to have submitted a sufficient number of otherwise-valid signatures—something that no one will know until MRL’s signatures are verified, counted, and certified by the Secretary of State under the above-cited statutes. Second, the Secretary of State must make a determination that some or all of MRL’s signatures are invalid because the ballot title was adjudicated insufficient and unfair, and this determination must have rendered insufficient an otherwise-sufficient petition. Again, no one has any idea whether this will occur. If it does, the legislature has provided a clear statutory remedy and timeline: a §116.200 proceeding, which can be brought by any citizen within ten days of the Secretary’s decision. Accordingly, MRL’s

constitutional argument is unripe.

There are other reasons not to take up MRL's challenge. First, if it is an as-applied challenge to the application of §116.190, to them, MRL has not developed the record as to their own "injury." They summarily claim without any citation to record evidence that they "relied" on the Secretary of State to draft an adequate summary statement in September 2011, but then admit that she drafted a title other than the one they submitted, and that in the several months between the time of her action and the time they began to use it to circulate signatures, they took no action—as was their right—to challenge it. MRL Br. 59-60. There is no record evidence about the amount or timing of the alleged "time, effort, and expense put in by Rev. Bryan" or anyone else, nor is there evidence about whether this was justified given MRL's early notice that the Secretary had drafted language that lacked any reference to the "36%" cap that MRL claims is so central to their petition (and asked for in their own proposed summary). Before this Court even begins to consider whether MRL has stated the kind of claim for injury that might be redressable under the Missouri Constitution, these and other facts would have to be developed and tried in the first instance. In this case, they have not been tried or presented to anyone, and exist merely as free-floating, unsupported assertions.

For all of these reasons, this Court should not consider MRL's belated effort to sketch a constitutional claim.

IX.

THE TRIAL COURT DID NOT ERR IN DENYING SHULL AND STOCKMAN PERMISSIVE INTERVENTION IN THAT THE TRIAL COURT FOCUSED ON THE MOST IMPORTANT CONSIDERATION AND, AS THE COURT OF APPEALS HELD IN A FINAL DECISION THAT APPELLANTS LEFT UNDISTURBED, CORRECTLY FOUND THAT APPELLANTS' INTEREST WAS NOT IMPLICATED IN THIS SECTION 116.190 CHALLENGE.

(Responds to Shull & Stockman's Brief (sole point relied on))

This is the fifth bite at the apple for Shull and Stockman ("Shull"). From their initial motion to intervene, through discovery, through the trial court hearing, and through the now-final decision of the Court of Appeals, they were unable to establish a "unique personal interest" or even a "unique argument" that they would make in this §116.190 case. Now, with the exception of a few rhetorical embellishments, Shull largely repeats the arguments they made in their failed attempt to intervene as of right—even to the extent that significant parts of their brief appear to have been lifted verbatim from their briefs in the Court of Appeals.²³

²³ See, e.g., Shull Br. at 16-17, n.2 (referring to Ms. Vollet as "Appellants' counsel" when new attorneys have entered their appearance for Appellants Shull. It is a very minor

The only new materials in Shull’s brief are improper citations to newspapers and an increasingly desperate resort to political argument about the merits of the initiative. Especially in light of Shull’s briefing, it is clear that the trial court did not abuse its discretion and in denying permissive intervention.

A. The Standard of Review Is Abuse of Discretion

The standard of review is abuse of discretion on the denial of permissive intervention. Under Rule 52.12(b) when considering whether the trial court's ruling denying permissive intervention was an abuse of discretion this court looks to see if it was “clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.” *State ex rel. Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122, 131 (Mo. banc 2000).

B. Appellants’ Interest Was Not Implicated in this Section 116.190 Challenge

1. Permissive Intervention Requires a Unique Claim or Defense, or at the Very Least, a Unique Interest

Under Rule 52.12(b), Shull’s permissive intervention could only have come within the trial court’s discretionary authority if their “claim or defense and the main action [had] a question of law or fact in common.” Rule 52.12(b). But before the court’s

error, but another indication that Shull is simply cutting and pasting their old “intervention of right” arguments and labeling them “permissive intervention.”).

exercise of discretion even becomes relevant, there is a threshold issue: the existence of a prerequisite claim, defense, or interest under Rule 52.12(b)(2). As Shull now admits, they were at least required to show that they had a “claim, defense, or interest unique to themselves.” Shull Br. 29 (quoting *Comm. for Educ. Equality v. State* (“CEC”), 294 S.W.3d 477, 487 (Mo. banc 2009)). Permissive intervention “is inapplicable” where intervenors would “merely reassert[] the State’s defenses.” *CEC*, 294 S.W.3d at 487.

It is undisputed that Shull had no unique “claim” or “defense.” Shull has never pled a unique claim or defense (*Compare* Shull’s Answer, LF76-80, to Answer of Carnahan, LF59-70, and Answer of Schweich, LF51-56, which are more thorough and assert additional defenses neglected by Shull). Instead, Shull has placed all their eggs in one basket: their allegedly “unique interest” in the validity of their own signatures and the qualification of the petition for the ballot, which, in turn, they believe gives them a unique interest in the outcome of Francis’ challenge to the official ballot title as “insufficient” and “unfair.” Shull Br. 30.

This Court recently made clear that if the facts indicate to the trial court that a “unique interest” exists, it merely permits—it does not require—the trial court to grant permissive intervention:

Proposed intervenors are not entitled to permissive intervention if they simply will reassert the same defenses, but intervention can be appropriate when the intervenors can

show “interest *unique* to themselves.” *See id.* (emphasis added). Moreover, “[p]ermissive intervention may be permitted when the intervenor has an economic interest in the outcome of the suit.” *Meyer v. Meyer*, 842 S.W.2d 184, 188 (Mo.App.1992) (internal quotations omitted)[.]

Johnson v. State of Missouri, SC92351, 2012 WL 1921640 at *6. As discussed below, Shull did not even meet the baseline criteria for calling upon the trial court’s discretion: they asserted the same defenses, and the Court of Appeals issued a final and binding decision that their alleged personal interest in their signatures was not sufficient to gain entry to this limited-purpose §116.190 proceeding. LF138.

2. A Final and Binding Decision of the Court of Appeals Held that Shull Has No Unique Interest in this suit

a. Collateral Estoppel Bars the Shull Appellants’ Attempt to Resurrect the Same “Personal Interest” Argument Previously Rejected by the Court of Appeals

Although Shull admits that, barring any unique claim or defense, their permissive intervention argument hangs by the thread of “unique personal interest,” the Court of Appeals finally and definitively severed that thread in its March 26, 2012, opinion. *See Prentzler v. Carnahan*, __S.W.3d__ 2012 WL 985839 (Mo. App. W.D. Mar. 26, 2012) (no transfer or rehearing applied for or taken); *see also* LF127.

Because that decision is final, collateral estoppel bars the relitigation of Shull’s

“unique interest” under the “permissive intervention” heading. *See James v. Paul*, 49 S.W.3d 678 (Mo. banc 2001) (collateral estoppel applies where the issue decided in the prior litigation was identical, there was a judgment on the merits, the parties are the same or in privity, and there was a full and fair opportunity to litigate the issue).

The elements of collateral estoppel are met here. The parties in *Prentzler v. Carnahan* were identical to those here; the Court of Appeals’ decision was on the merits and a mandate issued; and no motion for transfer or for reconsideration was filed. Even though the Court of Appeals was considering “of right” instead of permissive intervention, the precise issue upon which it rested its decision was Shull’s claimed “personal interest” as signatories and supporters in §116.190 litigation over the ballot title’s sufficiency and fairness.

The Court of Appeals recognized Shull’s argument—identical to the one they assert here—that “as signatories and supporters of the ... Initiative..., they have a personal interest in the validity of the initiative petition, in seeing [it] circulated and qualified for the November 2012 ballot, and in having their signatures counted as valid.” *Prentzler*, 2012 WL 985389 *3. *Compare* Shull Br. 30 (using almost identical language to describe their “personal interest”). Yet the Court of Appeals rejected this argument, holding that “Appellants have failed to establish that, as mere supporters and signatories of an initiative petition, they have a sufficient interest in the underlying §116.190 actions.” *Id.* The Court noted that §116.190 actions have a limited purpose, and that

accordingly, “Appellants’ proposed interests in having their signatures count and qualifying the initiative for the ballot are not at issue in the underlying litigation.” *Id.* at *3-4.

Further, echoing a failure in Shull’s prior and current arguments (which were identical), the Court noted that:

Appellants have failed to show any such immediate or direct claim...as they have not established how the outcome of those cases will cause them to incur any legal liability or directly affect their legal rights as supporters ... they have failed to establish that they have a sufficient interest in the outcome of the underlying litigation by merely signing and supporting an initiative petition.

Id. at *5.

The Court concluded that “opening intervention of right to citizens solely because they have a differing political view as to the ballot initiative would open the floodgates to oppressive intervention, and no public policy would be served. *Id.* at *6. The Court might have added that premising “interest” for intervention on a party’s political position essentially invites that party to engage in political argument and rhetoric of the type that consistently infects Shull’s briefing, and would likely have infected their conduct of litigation before the trial court, causing needless delay and burden on all of the parties and

the court. The Court of Appeals properly decided against Shull on the precise issue they raise again as a direct appeal. Shull's claim is barred by collateral estoppel.

b. The Trial Court's Exercise of Discretion and the Court of Appeals'

Decision Are Consistent With the Law and With Common Sense

Shull wrongly charges the trial court with "arbitrary indifference" to their unique personal interests as signers and supporters of the petition. They have forgotten or ignored the fact that the trial court *actually recognized the existence of that interest* (a decision specifically noted and reversed by the Court of Appeals in its final and binding decision).²⁴

Instead, the trial court based its decision on Shull's open admission that they would not present any unique claim or defense and would instead argue for the precise version of the ballot title already being defended by the State defendants. Rather than being "arbitrary," this decision followed this Court's most recent statements of law, which are themselves cited without argument in Shull's brief. *See* Shull Br. 30; *Johnson*,

²⁴ The Court of Appeals "note[d] that the trial court stated that a 'citizen of this State who has differing political views...does have an interest in litigation concerning the Initiative.'" *Prentzler*, 2012 WL 985389 at *5. However, it explained that "construing the meaning of an interest for purposes of intervention as of right that broadly would completely eviscerate Rule 52.12(a)(2)" and would "open the floodgates to oppressive intervention..." *Id.* at *6.

SC92351, 2012 WL 1921640 at *6 (“Proposed intervenors are not entitled to permissive intervention if they simply will reassert the same defenses, but intervention can be appropriate when the intervenors can show ‘interest *unique* to themselves’”); *CEC*, 294 S.W.3d at 487 (Permissive intervention “is inapplicable” where intervenors would “merely reassert[] the State’s defenses.”).

Most of Shull’s argument is based upon their speculation that they would have prepared for trial and cross-examined witnesses more proficiently than the trial counsel for the State parties. Shull Br. 33-34. Indeed, as *amici*, Shull had every opportunity to make legal arguments (and actually proffered oral argument and briefing on all of the issues, both legal and factual, TR250-255), so their complaint can only be directed to the State parties’ chosen method of contesting the evidence presented by the plaintiffs.

There are several problems with Shull’s sole reliance on this particular aspect of the litigation to prove that the trial court’s decision was “arbitrary.” First, differing views of trial strategy should be irrelevant to the permissive intervention analysis. Second, the issues related to the summary statement were legal issues, and Shull fully used their opportunity to orally argue and brief those issues before, during, and after the trial.

Third, Shull incorrectly suggests that the best way to contest plaintiffs’ evidence was to put on counter-evidence. But this is only one way of contesting facts, and there are many. See *Pearson v. Koster*, SC92317, 2012 WL 1926035 (Mo. banc May 25, 2012).

Indeed, under the theory shared by Appellants, no evidence was admissible to prove the sufficiency or fairness of the fiscal note or fiscal note summary other than the materials the Auditor had already received during his initial review of the petition. The State believed that the most effective means of contesting the evidence was to stick to this theory in its own trial presentation. The fact that the trial court ultimately disagreed that one portion of the Auditor's fiscal note and summary was "sufficient" does not establish that the State's counsel were ineffective.

Additionally, Shull's new appellate counsel characterizes Plaintiffs' evidence at trial as "outrageous" and "absurd," claiming that Shull would have "exposed" this by putting into evidence various facts about the effects of a 36% loan cap on lenders, borrowers, and fiscal impacts on the state. Shull Br. 33-35. These *ex post* assurances of Shull's winning trial strategy are irrelevant now, because the relevant issue is what the trial court was presented on Shull's motion, not what Shull claims would have happened at trial. *State ex rel Nixon v. Am. Tobacco Co., Inc.*, 34 S.W.3d 122, 131 (Mo. banc 2000) (considering what evidence was "then before" the trial court when it exercised its discretion).

Shull presented none of these newly outlined defenses, proposed factual showings, or points of proof to the trial court in their briefs or at the hearing on intervention. See 12/28/11 TR. They cannot now inject new "facts" into the record by proposing lines of cross-examination or alternative evidence that they claim would have effectively

combated Plaintiffs' experts. Shull now claims that they would have submitted evidence that would have challenged the core assumptions of the fiscal note itself, arguing that a positive fiscal impact could be expected by capping rates at 36% and shutting down numerous lending businesses. Shull Br. 33-35. The forum for such an argument was a §116.190 challenge.

Collateral estoppel, Missouri law on permissive intervention, and common sense all require that this Court reject Shull's effort for yet another bite at the apple. The trial court's exercise of discretion should be affirmed.

X.

THE TRIAL COURT ERRED IN DISMISSING FRANCIS AND HOOVER'S CONSTITUTIONAL CLAIMS AS NOT RIPE, BECAUSE SUCH COUNTS ARE RIPE FOR ADJUDICATION, IN THAT THE CLAIMS FALL INTO AN EXCEPTION TO THE RIPENESS DOCTRINE BECAUSE (A) THE PROPOSED MEASURE IS FACIALLY UNCONSTITUTIONAL AS VIOLATIVE OF MISSOURI'S UNIFORM RATE PROVISION IN ARTICLE III, SECTION 44 OF THE MISSOURI CONSTITUTION AND (B) THE PROPOSED MEASURE IS FACIALLY UNCONSTITUTIONAL AS VOID FOR VAGUENESS, VIOLATIVE OF THE DUE PROCESS CLAUSES OF THE MISSOURI AND UNITED STATES CONSTITUTIONS.

While the general rule is pre-election substantive constitutional challenges of ballot measures are not ripe, an exception exists for proposed measures which are facially unconstitutional. Here, the Anti-Payday Lenders Initiative is facially unconstitutional because it violates the Missouri Constitution's uniform rate provision and is void for vagueness. Therefore, Francis and Hoover's constitutional claims are ripe for review and this court should reverse the decision of the trial court holding otherwise.

A. The Standard of Review is *de novo*

The applicable standard of review for appeals of court-tried civil cases is found in *White v. Director of Revenue*, 321 S.W.3d 298, 307-308 (Mo. banc 2010). The issue of whether Francis and Hoover's claims are ripe for determination is an issue of law. This Court applies *de novo* review to questions of law decided in court-tried cases. *Id.* at 308. Questions of law are reviewed "independently [and] without deference to [the trial court's] conclusions." *Moore v. Bi-State Dev. Agency*, 132 S.W.3d 241, 242 (Mo. banc 2004).

B. Francis and Hoover's constitutional claims are ripe because the proposed measure is facially unconstitutional

Missouri courts follow the general rule against pre-election review of claims concerning the substantive legality of ballot measures, based on the fact that such claims may not be ripe. *State ex rel. Hazelwood Yellow Ribbon Comm. v. Klos*, 35 S.W.3d 457, 468 (Mo. App. E.D. 2000). There are, however, two exceptions to the general rule: (1) courts will consider whether the measure is appropriate for the initiative process, i.e., that it is legislative rather than administrative and (2) courts will conduct pre-election review of a ballot measure when it is facially unconstitutional. *Id.* This Court suggested in *Trotter v. Cirtin*, 941 S.W.2d 498, 500 (Mo. banc 1997) that pre-election review was *permissible* in cases where the measure's unconstitutionality is "so clear or settled as to constitute matters of form" (citing *Craighead v. City of Jefferson*, 898 S.W.2d 543, 545

(Mo. banc 1995)) (emphasis added). The Eastern District later concluded that pre-election judicial review is both permissible *and appropriate* where the proposed measure is facially unconstitutional. *State ex rel. Hazelwood Yellow Ribbon Comm. v. Klos*, 35 S.W.3d at 469 (emphasis added).

In *Hazelwood Yellow Ribbon Committee*, the proposed city charter amendment required a two-thirds majority referendum vote of approval on every Hazelwood tax increment financing measure. *Id.* Section 99.835.3 stated: “No referendum approval of the electors shall be required as a condition to the issuance of [TIF] obligations[.]” *Id.* Article VI, § 19(a) of the Missouri Constitution provides that a charter city cannot have powers that are limited or denied by statute. A charter provision that conflicts with statute violates Article VI, § 19(a). *Id.*

The trial court found a conflict between the proposed measure and the state statute. *Id.* On appeal, the issue of whether the proposed measure conflicted with state statute was briefed and “vigorously argue[d]” by the parties. *Id.* Appellants argued that the alleged conflict was either non-existent or “‘not so clear and self-evident’ as to warrant an exception to the general rule prohibiting pre-election judicial review[.]” *Id.* at 470. The Eastern District Court of Appeals rejected Appellants’ argument, finding that the plain language of the proposed measure “patently contravene[d]” the state statute, requiring “precisely what the statute prohibits” thus violating Article VI, § 19(a) of the Missouri

Constitution.²⁵ *Id.*

Here, the Anti-Payday Lenders Initiative patently contravenes the Missouri Constitution. The Missouri Constitution requires the rates of interest fixed by law to be uniform, i.e., applicable to all lenders. Mo. Const., art. III, §44. The Anti-Payday Lenders Initiative requires on its face that the rate of interest *for particular lenders* be capped at 36%. The interest rate cap is not applicable to all lenders. The Anti-Payday Lenders measure states that the purpose of the initiative is “to prevent *lenders*, such as those who make what are commonly known as payday loans, car title loans, and installment loans...from charging excessive fees and interest rates...” §408.100, Initiative Petition (IP). On its face, it makes clear that only certain lenders will be prevented “from charging excessive...interest rates.” *See* subsection C, *infra*, for a full discussion. In addition, the Anti-Payday Lenders Initiative is void for vagueness, on its face, because no reasonable person could know what conduct is prohibited by the Anti-Payday Lenders Initiative. *See* subsection D, *infra*, for a full discussion.

Before the trial court, the Secretary relied entirely on *Knight v. Carnahan*, 282 S.W.3d 9 (Mo. App. W.D. 2009), for its argument that Francis’ claims are unripe. The Secretary suggested that because the constitutional challenges in *Knight* were “debatable” the court determined the claims were unripe.

²⁵ The Eastern District went further to find that a second proposed charter amendment was also unconstitutional. *Id.* at 471.

The court, in *Knight*, confirms that “precedent does grant us [the Western District Court of Appeals] some discretion to review allegations that an initiative is facially unconstitutional.” *Id.* at 21. Still, the court found the claims unripe. *Id.* Appellants in *Knight* made four constitutional claims. *Id.* at 22. The State parties argued each claim was debatable. *Id.* The court in *Knight* pointed out the claims were “debatable” and held that Appellants claims failed to assert a constitutional violation so obvious as to be a matter of form. *Id.*

Francis’ constitutional claims are distinguishable from the claims made in *Knight*. Nowhere and at no time did the Appellants in *Knight* assert that the proposed initiative is facially unconstitutional as Francis claims here.

The Missouri Constitution prohibits laws that require nonuniform rates of interest for a class of lenders on its face; the Anti-Payday Lenders Initiative establishes a nonuniform rate for a certain class of lenders on its face. The Anti-Payday Lenders measure patently contravenes the Missouri Constitution, the violation is so obvious that it constitutes a matter of form. *Knight* is distinguishable from this case on the basis that the constitutional claims that were raised were not only debatable, but weak.

Despite the description of the claims by the Western District in *Knight*, whether or not constitutional claims are “debatable” is not the test for facial unconstitutionality. The parties in *Hazelwood Yellow Ribbon Committee* vigorously argued the constitutionality of the proposed measure. Still, the court found the proposed measure to be facially

unconstitutional. The question is whether the constitutional violation is obvious enough – whether the proposed measure patently contravenes the Constitution on its face.

The claims in *Knight* were much weaker than the claims raised by Francis here. *Knight* did not address whether a measure which specifically provides for something the Missouri Constitution prohibits is facially unconstitutional and therefore ripe for pre-election review. This case is distinguishable from *Knight*; as such, this court should reverse the trial court's decision that Francis and Hoover's constitutional claims were unripe and rule that the Anti-Payday Lenders Initiative is unconstitutional.

C. The Anti-Payday Lenders Initiative facially violates the Missouri Constitution's uniform rate provision

Article III, Section 44 of the Missouri Constitution provides that any law which sets an interest rate limitation on loans shall be uniform as to lenders. The Anti-Payday Lenders Initiative caps interest rates for particular classes of lenders. The Anti-Payday Lenders Initiative facially violates the uniform interest rate provision of the Missouri Constitution.

Article III, Section 44 of the Missouri Constitution states:

No law shall be valid fixing rates of interest or return for the loan or use of money, or the service or other charges made or imposed in connection therewith, for any particular group or class engaged in lending money. The rates of interest fixed by law shall be

applicable generally and to all lenders without regard to the type or classification of their business.

The plain language of the proposed measure sets a new rate limitation of 36% for some, but not all, lenders. This exception for certain lenders is in conflict with the Constitution and as a result the entire proposed measure is void. As discussed above, this claim is ripe for review by this court, is properly before this court in this case and should be determined.

This Court has consistently held that Article III, Section 44 invalidates interest rate limitations that do not apply to *all* lenders. In *Household Finance Corporation v. Schaffner*, this Court addressed the effect of interest rate limitations on “small loan” lenders. 203 S.W.2d 734 (Mo. banc 1947). This Court rejected the State’s argument that the Small Loan Act did not violate the uniform interest rate provision of the Missouri Constitution, finding that the limitations applied only to small lenders. *Id.* at 738. This Court found that the limitations violated Article III, Section 44, since the limitations did not apply to other classifications of lenders. *Id.* This Court determined the business of small lenders was distinct from other lenders (e.g., banks). *Id.* at 738. This Court found that Article III, Section 44 prohibits interest rate limits for anything less than every classification:

In the instant case the question is not as to the reasonable or unreasonable classification, for Section 44 prohibits *any* favored

classification of lenders.

Id. at 738 (emphasis in original). The Court continued, explaining that banks and other corporate lenders operate under other laws and would be immune from the Small Loan Act limitations and regulations. *Id.* The Court concluded:

Undoubtedly the law purports to set up for a favored group or class of licensed lenders high rates than are available to lenders who cannot or do not procure a license and engage in the small loan business, and this is in conflict with Section 44.

Section 44 does not prohibit the enactment of laws authorizing the formation and regulation of different types of lenders, such as banks, savings and loan associations, etc. Nor does it prohibit the enactment of laws providing reasonable classification of loans as to amounts, or otherwise, with different permissible rates of interest for different types of loans, but the rates provided for any type of loans, must be available to all lenders who make such loans, without regard to the type or classification of their business.

Id. Thus, any interest rate limitation (or authorization) must apply to *all* lenders who make such loans regardless of size or type.

This Court re-emphasized the importance of the uniform interest rate provision in

1979, when limits were applied to credit union loans to members. *St. Louis Teachers' Credit Union v. Marsh*, 585 S.W.2d 474 (Mo. banc 1979). In 1978, Section 370.300.1 was enacted, a provision which restricted the interest a credit union could charge a member. *Id.* at 475. The St. Louis Teachers' Credit Union brought an action against the Division of Credit Unions alleging that this interest rate limit violated the uniform interest rate provision of the Missouri Constitution. *Id.* The Division alleged that the interest rate limit only applied to a type of loan (to credit union members) not to a class of lenders. *Id.* This Court reviewed the *Household Finance* case, found it controlling and ruled that §370.300.1 violated the Constitution's uniform interest rate provision of the Missouri Constitution. *Id.* at 476.

The measure of this Court's decisions in *St. Louis Teachers' Credit Union* and *Household Finance*, is that limitations on interest rates are disfavored and if there is a showing that any classification of lenders is discriminated against or favored, that the limitation is unconstitutional. Here, the language of the proposed measure on its face creates a preference for certain lenders (e.g., banks) and a discrimination against other lenders (e.g., payday, title and installment lenders).

First, the new language in §408.100.1, IP, demonstrates that the intent of the proposed measure is to discriminate against a particular class of lenders:

It is the intent of the people of Missouri to prevent lenders, such as those who make what are commonly known as payday loans, car title loans, and installment loans...from charging excessive fees and interest rates...

This language unabashedly explains that the intent of the measure is to single out a group of lenders and apply an interest rate limitation on them, and not on other lenders. The statement of intent itself should be sufficient to evidence the facial violation of Article III, §44 of the Missouri Constitution.

The plain language of the proposed measure confirms that the intent and the effect of the measure is to discriminate against a class of lenders (payday, title and installment) by limiting the amount of interest they may charge and is to favor other classes of lenders (e.g., banks and credit unions), which will not be subject to such limitation. This classification contravenes Article III, Section 44 of the Missouri Constitution.

In addition, §408.100.2, as proposed by the Initiative Petition, contains the following language:

This section shall apply to all loans *which are not made as permitted by other laws of this state except that it shall not apply to loans which are secured by a lien on real estate,*

*nonprocessed farm products, livestock, farm machinery or
crops or loans to corporations.*

(emphasis added). This language shows that the 36% interest rate limit does not apply to all classes of lenders. For example, this provision carves out loans made under other laws of the state. Therefore, loans made by credit unions would be excluded from this section.

Section 370.300 provides that a credit union may make loans to their members (as with other loans) but are guaranteed at least a minimum interest charge of \$1 per month. While \$1 per month may not seem like a concern, this can easily exceed the limitation in the proposed §408.100. If a member were to borrow \$10 for a month and pay the minimum guaranteed rate of \$1 per month, the annualized rate (as required by the proposed §408.100) would be 120% (much above the 36% limitation in the proposed measure). In fact, if a credit union member borrowed \$100 and paid it back one week later with the \$1 in interest, then the annual percentage rate would be 52%, still far in excess of the proposed 36% cap. In either event, the credit union can still extend this loan but an installment, title or payday lender would be barred from making the same loan. This fact pattern can be replicated with banks, savings and loan, agricultural lending institutions, and others. Only installment, title and payday lenders are always capped at 36% under the proposed measure, with no exception.

The State will likely make a similar argument as was raised in *St Louis Teachers'*

Credit Union, i.e., that the proposed measure classifies loans rather than lenders. The argument should be rejected just as it was in *St. Louis Teachers' Credit Union*. The plain language of the proposed measure shows the measure is aimed at *lenders*, not loans. The purpose of the initiative petition is "to prevent *lenders*, such as those who make what are commonly known as payday loans, car title loans, and installment loans...from charging excessive fees and interest rates..." §408.100.1, IP (emphasis added). The initiative also seeks to prohibit "*lenders* from structuring other transactions to avoid the rate limit through subterfuge." §408.100.1(3), IP (emphasis added).

Not only does the plain language suggest the measure is aimed at *lenders*, the Appellants have interpreted the measure as targeting certain lenders. Indeed, the original ballot title stated "Shall Missouri law be amended to limit the annual rate of interest, fees, and finance charges for payday, title installment, and consumer credit loans and prohibit such *lenders* from using other transaction to avoid the rate limit?" LF50. The trial court, in rewriting the Summary Statement, interpreted the proposed measure as one affecting a particular class of lenders: "Shall Missouri law be amended to allow annual rates up to a limit of 35% including interest, fees, and finance charges for payday, title, installment, and consumer credit loans and prohibit *such lenders* from using other transactions to avoid the rate limit?" LF205. Shull's Brief makes clear that the initiative is aimed not at loans, but lenders. *See* Shull Br., p. 8, n.3 (emphasis added):

According to a January 2011 Missouri Division of Finance

report, Missouri had an average of 1,040 payday *lenders* in operation between October 2009 and September 2010. During that time frame, these *lenders* made more than 2.43 million payday loans...The report indicates that Missouri licenses nearly twice as many payday *lenders* as Kentucky and Illinois, and nearly three times as many payday *lenders* as Oklahoma and Iowa.

The plain language of the proposed measure shows that the Anti-Payday Lenders Initiative is facially in conflict with Article III, Section 44. Article III, Section 44 requires uniformity of interest rates as to lenders and the Anti-Payday Lenders Initiative creates an interest rate cap for certain lenders. This Court should not only rule that the trial court erred in holding Francis and Hoover's constitutional claims were not ripe, but it should also rule that the proposed initiative is invalid because it violates Article III, Section 44.

D. The Anti-Payday Lenders Initiative is facially void for vagueness

A measure is void for vagueness when it does not convey to the average person who is regulated and what conduct is prohibited. The plain language of the proposed measure does not give notice to the average citizen what persons or actions are within its scope. The Anti-Payday Lenders Initiative is void for vagueness.

The void for vagueness concept arises from the Fourteenth Amendment's Due

Process Clause. *State ex rel. Nixon v. Telco Dir. Pub.*, 863 S.W.2d 596, 600 (Mo. banc 1993). The Missouri Constitution also contains a due process provision. Mo Const. art. I, § 10. “It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *Cocktail Fortune, Inc. v. Supervisor of Liquor Control*, 994 S.W.2d 955, 957 (Mo. banc 1999). “The void for vagueness doctrine ensures that laws give fair and adequate notice of prescribed conduct and protects against arbitrary and discriminatory enforcement.” *Id.* The test “is whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.” *Id.* “However, neither absolute certainty and impossible standards of specificity are not required when determining whether terms are impermissibly vague...” *Id.*

The vagueness doctrine is rooted in two concepts. “First it is unfair to apply a law to a person who could not have determined in advance what conduct the law permitted and prohibited. Persons cannot fairly be required to obey a law so unclear in its terms that it provides no notice of its scope.” *State ex rel. Nixon*, 863 S.W.2d at 600. “Second, a vague law provides no standard to guide or restrict enforcement officials and courts to lessen the possibility of arbitrary and discriminatory enforcement.” *Id.*

Here, the proposed measure states as follows: “A person shall not engage in any device...”. §408.100.3, IP. This language is so vague that no reasonable person could know what conduct is prohibited. A “device” is defined as follows:

1: something that is formed or formulated by design and usu.
with consideration of alternatives, experiment, and testing:
something devised or contrived; contrivance, invention,
project.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 618 (2002). This language is so broad as to be uninformative to "a person" to know what it relates to. The term "person," is also so broad to be uninformative since it includes anyone and everyone (from corporations to individuals). A family member lending to another family member could be limited by the proposed amendment....or they may not be. No one knows until enforcement actions are taken. The lack of knowledge of what is prohibited is the fundamental reason which the void for vagueness doctrine was developed. If a person cannot understand what they are prohibited from doing, then the government can sanction them for any conduct and use the vagueness of the law as a justification for the sanction.

The language is so all encompassing that no one can be put on reasonable notice whether the measure will apply to him or her. The measure is void for vagueness under the Due Process clauses of the Missouri and the United States Constitutions.

XI.

THE TRIAL COURT ERRED IN DISMISSING FRANCIS AND HOOVER'S CONSTITUTIONAL CLAIMS AS NOT RIPE, BECAUSE SUCH COUNTS ARE RIPE FOR ADJUDICATION, IN THAT (A) THE PROPOSED MEASURE IS FACIALLY UNCONSTITUTIONAL AND (B) TAXPAYERS SHOULD NOT BE FORCED TO BEAR THE BURDEN AND EXPENSE OF HOLDING AN ELECTION ON A FACIALLY UNCONSTITUTIONAL MEASURE.

Taxpayers should not have to fund an election for a facially unconstitutional law. In addition, voters should not be forced to give their time, thought and deliberation to a measure which will be invalid if enacted. The Anti-Payday Lenders Initiative is facially invalid. Allowing the Anti-Payday Lenders Initiative to appear on the ballot, despite its facial invalidity, is a waste of taxpayers' money and time, and the state's limited resources.

A. The Standard of Review is *de novo*

The standard of review is *de novo*, and is the same as the standard of review for Point X, that discussion is incorporated by reference here.

B. The Anti-Payday Lenders Initiative is facially unconstitutional

The proposed measure in the Anti-Payday Lenders Initiative is facially

unconstitutional because it violates Missouri's uniform rate provision in Article III, Section 44 of the Missouri Constitution and it violates the due process clauses of the Missouri and United States Constitutions. *See* Point X, *supra*.

C. Taxpayers should not be forced to shoulder the burden of holding an election on a facially unconstitutional measure

This Court has previously ruled that political subdivisions should not be forced to hold elections for unconstitutional measures. "If the ordinance were in fact unconstitutional, or was void for any other reason...We would not impose upon Kansas City the burden and expense of submitting to a vote an ordinance which would be of no effect if adopted." *State ex rel. Cranfill v. Smith*, 48 S.W.2d 891, 893 (Mo. banc 1932) (quoting *State ex rel. Asotsky v. Regan*, 298 S.W. 747, 748 (Mo. banc 1927)).

Francis and Hoover are taxpayers of the State of Missouri. JS 3. As taxpayers, they have an interest in seeing that the funds of the State of Missouri, their tax dollars, not be used to hold an election on an invalid initiative. The fiscal note for the Anti-Payday Lenders Initiative states the costs of holding an election on this initiative will be borne by taxpayers. That amount is at least \$170,000 per initiative petition, and over \$1 million in total, regardless of whether there is one or more initiative petitions. Ex. 3, p.3; LF34. These costs are paid by an appropriation by the General Assembly out of the general revenues of this state. *Id.*

Therefore, Francis and Hoover, as taxpayers, have an interest in the determination

of their constitutional claims now, not upon the enactment of the proposed Initiative Petition or at some later date. If the Court waits, Francis and Hoover and all taxpayers will be out their tax dollars and will have no recourse to recoup the spent funds. This imminent and irreparable harm is sufficient to overcome the question as to ripeness.

It has been said that anyone with a filing fee can file a lawsuit and allege a complaint against anyone else. There is not a fee for filing initiative petitions. Truly, anyone can file a sample sheet for an initiative petition on any subject. In 2012, the initiative petition at issue here is just one of 134 that were submitted to the Secretary, a 500% increase in the number of petitions than were filed in 2002.²⁶ There is nothing to suggest that the trend will reverse itself anytime soon.

With each initiative petition comes the potential for substantial cost to the state if the measure is put to a vote. The Secretary has stated the cost is at least \$170,000 per initiative petition, and over \$1 million in total, regardless of whether there is one or more initiative petitions. Ex.3, p.3; LF34. While the number of initiatives continue to rise, the state's budget situation continues to decline. Missouri continues to face increasing budget shortfalls, so much so that Missouri is said to be in a "budget crisis."

A court should not compel the doing of a vain thing and the useless spending of money. Before this state spends its limited resources and taxpayer dollars on what could

²⁶Secretary of State, *2012 Initiative Petitions Approved for Circulation in Missouri* http://sos.mo.gov/elections/2012petitions/12init_pet.asp (accessed May 29, 2012).

be a useless act, this court should consider the claims raised by Francis and Hoover. While Francis and Hoover recognize the importance of the initiative petition and a court's reluctance to intervene, the Missouri Constitution does not grant the right to proponents to obtain a vote of the people on a facially invalid proposed measure.

This court should also consider the effect of putting a facially invalid measure before the voters of this state. As one court has put it:

We are convinced that if the legislation is in fact invalid, it would seem to us to be wholly unjustified to allow the voters to give their time, thought and deliberation to the question of the desirability of the legislation as to which they are to cast their ballots, and thereafter, if their vote be in the affirmative, confront them with a judicial decree that their action was in vain[.]

Schultz v. City of Philadelphia, 122 A.2d 279, 283 (Pa. 1956). The public interest is not served, and indeed is harmed, in putting a facially invalid measure before the voters.

CONCLUSION

The trial court's final judgment holding that the Fiscal Note and Fiscal Note Summary are insufficient and unfair is supported by facts and law. This Court should defer to the factual determinations of the trial court. A review of the law shows that all of Appellants' points are without merit. They have abandoned any challenge to one of the

two bases for the trial court's decision on the Fiscal Note and Summary and thus this Court should affirm that decision.

The trial court's final judgment holding that the Summary Statement is insufficient and unfair is similarly supported by facts and law. The main purpose of the Anti-Payday Lenders Initiative is to set a 36% rate and force a class of lenders out of business. The change to the Summary Statement should be affirmed by this Court.

Finally, the trial court erred in holding that the constitutional claims raised by Respondents/Cross-Appellants Francis and Hoover were not ripe. The proposed Anti-Payday Lenders Initiative facially violates the Missouri and United States Constitutions and this Court should so rule and save taxpayers the cost of a useless election on an invalid initiative.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned certifies that:

- (1) This brief contains the information required by Rule 55.03;
- (2) This Brief complies with the limitations contained in Rule 84.06(b); and
- (3) There are 29,545 words in this Brief.

/s/ Marc H. Ellinger
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CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of the foregoing Brief of Respondents/Cross-Appellants Francis and Hoover were served via case.net this 15th day of June, 2012, to the following:

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